

19
No. 92-1911-CSX
Status: GRANTED

Title: PUD No. 1 of Jefferson County and City of Tacoma,
Petitioners
v.
Department of Ecology of Washington State,
Department of Fisheries and Department of Wildlife

Docketed:
June 1, 1993

Court: Supreme Court of Washington

Counsel for petitioner: Shapiro, Howard Eliot

Counsel for respondent: Gregoire, Christine, Manning, Jay J.,
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| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|---|
| 1 | Jun 1 1993 | G | Petition for writ of certiorari filed. |
| 3 | Jun 25 1993 | | Order extending time to file response to petition until August 6, 1993. |
| 4 | Aug 6 1993 | | Brief amicus curiae of Northwest Hydroelectric Association filed. |
| 5 | Aug 6 1993 | | Brief of respondents State of Washington Department of Ecology, et al. in opposition filed. |
| 6 | Aug 6 1993 | | Brief amici curiae of American Forest & Paper Association, et al. filed. |
| 8 | Aug 6 1993 | | Brief amicus curiae of Pacific Northwest Utilities filed. |
| 7 | Aug 25 1993 | | DISTRIBUTED. September 27, 1993 |
| 9 | Aug 27 1993 | X | Reply brief of petitioners filed. |
| 10 | Oct 4 1993 | | Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 5, 1994. Rule 29 does not apply. ***** |
| 11 | Nov 10 1993 | | Record filed. |
| | | * | Original record proceedings Supreme Court of Washington (2 BOXES) |
| 12 | Nov 15 1993 | | Brief amicus curiae of Northwest Hydroelectric Association filed. |
| 15 | Nov 15 1993 | | Brief amici curiae of American Forest & Paper Association, et al. filed. |
| 16 | Nov 15 1993 | | Brief amicus curiae of Pacific Northwest Utilities filed. |
| 13 | Nov 16 1993 | | Joint appendix filed. |
| 14 | Nov 16 1993 | | Brief of petitioners PUD No. 1 of Jefferson County, et al. filed. |
| 17 | Nov 16 1993 | | Brief amicus curiae of Niagara Mohawk Power Corporation filed. |
| 18 | Nov 16 1993 | | Brief amicus curiae of Western Urban Water Coalition filed. |
| 23 | Dec 2 1993 | G | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| 20 | Dec 13 1993 | | Brief of respondents State of Washington, et al. filed. |
| 19 | Dec 14 1993 | | Brief amici curiae of Vermont, et al. filed. |

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| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|--|------------------------|
| 21 | Dec 14 1993 | Brief amicus curiae of United States filed. | |
| 22 | Dec 14 1993 | Brief amici curiae of American Rivers, et al. filed. | |
| 24 | Dec 29 1993 | SET FOR ARGUMENT WEDNESDAY, FEBRUARY 23, 1994.(2ND CASE) | |
| 25 | Jan 5 1994 | Reply brief of petitioners filed. | |
| 27 | Jan 7 1994 | CIRCULATED. | |
| 26 | Jan 10 1994 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. | |
| 28 | Feb 23 1994 | ARGUED. | |

92^{No.} 1911

Supreme Court, U.S.
FILED

JUN 1 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

PUD No. 1 of JEFFERSON COUNTY

AND THE CITY OF TACOMA,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

DEPARTMENT OF FISHERIES AND

DEPARTMENT OF WILDLIFE

Petition for a Writ of Certiorari to the
Supreme Court of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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June 1, 1993

QUESTIONS PRESENTED

1. Whether the State of Washington, Department of Ecology, exceeded its authority under § 401 of the Clean Water Act ("CWA"), by conditioning a water quality certificate for a proposed hydroelectric project subject to the Federal Power Act ("FPA") on instream flows for fish habitat that are concededly in excess of requirements necessary for the protection of water quality?

2. Whether Congress intended § 401 of the CWA to repeal the FPA's reservation to the Federal Energy Regulatory Commission of comprehensive responsibility for determining in the FPA licensing process all relevant fish and wildlife, and other environmental conditions except those contained in state-issued water quality certificates pertaining to the abatement and control of the discharge of pollutants?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

No.

PUD No. 1 of JEFFERSON COUNTY
AND THE CITY OF TACOMA,
v. *Petitioners,*

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE

**Petition for a Writ of Certiorari to the
Supreme Court of the State of Washington**

PETITION FOR A WRIT OF CERTIORARI

PUD No. 1 of Jefferson County and the City of Tacoma (hereinafter, jointly, "Tacoma") petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.¹

¹ PUD No. 1 of Jefferson County is a public utility district organized under Wash. Rev. Code ("RCW") 4.04.020. The City of Tacoma operates a municipal electric system under RCW 35.92.050. They are authorized to jointly construct, own and operate electric utility properties by RCW 35.92.280-310.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington ("Washington Supreme Court"), No. 58272-6 filed April 1, 1993 (App. 3a), is reported at 121 Wash. 2d 179. The "Findings of Fact, Conclusions of Law and Final Judgment" of the Superior Court of the State of Washington in and for the County of Thurston ("Superior Court") were filed on August 14, 1991 (App. 29a). The Superior Court's Memorandum Opinion was filed May 8, 1991 (App. 37a). The "Revised Final Findings of Fact, Conclusions of Law and Order" of the State of Washington Pollution Control Hearings Board ("PCHB" or "Board") were issued January 25, 1989 (App. 46a). The PCHB's "Order Granting Cross Motion For Summary Judgment" was issued April 10, 1987 (App. 74a) and its "Order Denying Second Motion for Summary Judgment" was issued December 9, 1987 (App. 70a). The letter order of the State of Washington Department of Ecology granting request for water quality certification was issued June 11, 1986 (App. 82a). The decisions of the Superior Court, the PCHB and the Department of Ecology are unreported.

JURISDICTION

The opinion of the Supreme Court of Washington filed on April 1, 1993 (App. 3a) became the decision terminating review in that court, and therefore its judgment, on April 21, 1993 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATUTES INVOLVED

Sections 301, 302, 303, 306, 307, 401 and 510 of the Clean Water Act, also known as the Federal Water Pollution Control Act, 33 U.S.C. 1311, 1312, 1313, 1316, 1317, 1341 and 1370; and 4(e), 10(a)(1), 10(j) and 15(a)(2)-(3) of the Federal Power Act, 16 U.S.C.

797(e), 803(a)(1), 803(j) and 808(a)(2)-(3) are reproduced at App. 86a-146a.

STATEMENT

This case involves a water quality certificate issued by the State of Washington, Department of Ecology under § 401 of the Clean Water Act, for Tacoma's proposed Elkhorn Hydroelectric Project on the Dosewallips River in the State of Washington. The certificate prescribes minimum streamflow quantities to be maintained for fish habitat purposes. The Washington Supreme Court rejected Tacoma's contention that minimum streamflows for fish habitat must be determined under the comprehensive balancing process in Part I of the Federal Power Act, not by state-imposed conditions under § 401 of the CWA.²

A. Statutory and Regulatory Background

1. The Federal Power Act

Under the FPA, FERC has exclusive authority to issue licenses for the vast majority of new and existing hydroelectric projects. FPA §§ 4(e), 23(b), 16 U.S.C. 797(e), 817 (1988). This authority includes original licenses of the kind sought by Tacoma, and license renewals, known as "new licenses," which must be obtained when an original license term expires. FPA § 15, 16 U.S.C. 808 (1988).³

² A case presenting substantially similar issues is now pending on petition for a writ of certiorari to the Supreme Court of Vermont. *Simpson Paper (Vermont) Co. v. Department of Env'tl. Control*, No. 92-1012, order inviting the views of the United States issued March 8, 1993.

³ Between 1991 and the year 2000, FERC anticipates the relicensing of about 320 hydropower projects, or fully 17 percent of the facilities currently under its jurisdiction. Federal Energy Regulatory Commission, *Hydroelectric Project Relicensing Handbook 1* (April 1990); *Hydropower Disputes: A Battle of the*

The FPA requires that projects licensed by FERC be "best adapted to a comprehensive plan" for improving or developing the waterway, taking into account such potentially competing factors as the need for the project's power, energy conservation, navigation, irrigation, flood control, water supply, fish and wildlife protection, recreational opportunities, and other aspects of environmental quality. FPA §§ 4(e), 10(a)(1), 16 U.S.C. 797(e), 803(a)(1) (1988).

Congress' intent in enacting the Federal Water Power Act of 1920, the FPA's predecessor statute, was "to secure a comprehensive development of national resources". *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 181 (1946). The Court has observed that the key to that rational development is centralization of licensing authority in one federal administrative body which would exercise a consistent and comprehensive planning role. *Id.* at 164, 182. Absent an express and exceptional delegation to the States of authority to impose requirements on this process, FERC's pervasive jurisdiction over the licensing of hydroelectric projects is exclusive. *FPC v. Oregon*, 349 U.S. 435, 446 (1955).⁴ These principles recently were reconfirmed in *California v. FERC*, 495 U.S. 490, 110 S. Ct. 2024 (1990).

Endangered Salmon, Cogeneration & Resource Recovery, May/June 1991, at 22, 24 ("More than half of these licenses will expire in 1993."). Between 1990 and 1993 alone, the licenses for nearly 200 hydropower plants are due to expire, representing over 2,200 MW of electric generating capacity. Electric Power Research Institute, *Lessons Learned in Hydro Relicensing (1984-1989): Trends, Costs, and Recommendations* 2-1 (May 1991); Richard T. Hunt & Judith Mohsberg, *Relicensing Entanglements*, Independent Energy, January 1991, at 48. Most of these are the subject of applications now pending at FERC. *Special Supplement 1992 Edition*, Hydrowire, §§ 7-9, August 1992.

⁴ The state water quality certificate authority defined in § 401 of the CWA is an example of such a delegation.

Before issuing a license under the FPA, FERC must weigh potential environmental impacts of a proposed project—or, in the case of a license renewal, impacts of continued operation. FERC assesses potential impacts on water quality, fish, wildlife and botanical resources, historic and archeological resources, recreational resources, land management, and aesthetics.⁵ Under § 10(j) of the FPA, 16 U.S.C. 803(j), FERC must include in licenses conditions for the protection and enhancement of fish and wildlife, and must adopt conditions recommended by federal and state fish and wildlife agencies, unless it expressly finds those recommendations to be inconsistent with the purposes and requirements of the FPA or other provisions of applicable law.

2. The Clean Water Act

a. *The § 401 Certification Requirement.* Section 401 (a)(1) of the CWA, 33 U.S.C. 1341(a)(1) (1988), requires an applicant for a federal license or permit for any activity which may result in a discharge into navigable waters of the United States to obtain a certification (or waiver thereof) from the state in which the discharge originates. The state must certify that the discharge will comply with applicable sections of the CWA specifically enumerated in § 401(a). Each of the enumerated sections addresses discharges of pollutants. Section 301 concerns effluent limitations; it makes unlawful the discharge of any pollutant except in compliance with specified provisions of the CWA. Section 301(b)(1)(C) requires, *inter alia*, achievement of limitations established under federal law, including CWA water quality standards, and limitations established under state law no less stringent than federal requirements (as authorized by § 510). Section 302 sets standards for effluent limitations. Section

⁵ 18 C.F.R. 380.1-380.14 (1992). The types of information FERC must consider are set forth in FERC's regulations establishing requirements for license applications. 18 C.F.R. Parts 4, 16. See 18 C.F.R. 380.3(c)(1).

303 governs state water quality standards and implementation plans. Section 306 prescribes national standards of performance for the control of discharges. Section 307 sets effluent pretreatment standards and prohibits the discharge of certain effluents.

Section 401(d) of the CWA, 33 U.S.C. 1341(d) (1988), authorizes states to condition water quality certificates issued pursuant to § 401(a)(1) on specified water quality factors. It directs that state certifications shall impose limitations and monitoring requirements necessary to ensure compliance with:

any applicable effluent limitations and other limitations, under section [301] or [302] of this title, standard of performance under section [306] of this title, or prohibition, effluent standard, or pretreatment standard under section [307] of this title, and with any other appropriate requirement of State law set forth in such certification. . . .

By operation of § 301(b)(1)(C), water quality standards under CWA § 303 are incorporated into § 401(d). Any limitations and conditions included by the state in the certificate, including those based on other state requirements appropriate to § 401, then become conditions on the FERC license or other federal permit for the activity. FERC has ruled that it has no authority to reject or revise conditions in a state water quality certification, even if such conditions are outside the scope of § 401, because only the state courts may review such certifications.⁶

b. The EPA's Role in Establishing Water Quality Standards for § 401 Certifications. Section 401(a) ex-

⁶ *Town of Summersville*, 60 FERC ¶ 61,291 at 61,990 (1992), reh'g denied, 63 FERC ¶ 61,037 (1993); *Carex Hydro*, 52 FERC ¶ 61,216 at 61,770-771 (1990); *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172 (1990).

pressly includes § 303.⁷ Section 303 requires a state to establish water quality standards to be approved by the United States Environmental Protection Agency ("EPA").

Under EPA regulations, state water quality standards have as their purpose "to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act. . . .," which include water quality for the protection and propagation of fish. 40 CFR 131.2 (1992). Pursuant to CWA § 303(c)(2)(A), 33 U.S.C. 1313(c)(2)(A), the regulations provide that "[a] water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 CFR 131.2 (1992). Section 303(c)(2)(A) and the regulation result in a two-step format for state water quality standards. The first step requires the state to designate the uses desired for a particular body of water. The second step involves establishment of "criteria"—objective, scientifically ascertainable standards—the implementation of which should ensure attainment of water quality sufficient to achieve and protect the designated uses.

The first-step regulation, 40 CFR 131.6(a) (1992), directs a state to submit for EPA approval water quality standards which establish "use designations" pursuant to CWA § 303(c)(2). The second-step regulation, 40 CFR 131.6(c) (1992), directs that the state's standards must include "[w]ater quality criteria sufficient to protect the designated uses." The criteria are defined as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally pro-

⁷ Section 401(d) does not enumerate § 303, but includes it because § 401(d) requires compliance with § 301, which in turn incorporates water quality standards under the CWA through the provisions of § 301(b)(1)(C).

tect the designated use." 40 CFR 131.3(b) (1992). These criteria must be supported by information sufficient to ensure the "adequacy of the scientific basis of the standards." 40 CFR 131.6(f) (1992).

c. *Washington's Requirements Concerning Water Quality Standards and Streamflows.* The Department of Ecology administers the State of Washington's programs under the federal CWA, and decides whether to grant, grant with conditions or deny § 401 certifications. RCW 90.48.260 (Supp. 1992). In accordance with CWA § 303 and RCW 90.48.260, the Department has established "water quality standards for surface waters for the State of Washington". WAC Ch. 173-201.*

The standards comply with EPA's requirements concerning the scope and structure of state water quality standards under § 303. They classify Washington's waters into use and criteria classes. WAC 173-201-045. Class AA waters are deemed to be "extraordinary" because they "markedly and uniformly exceed the requirements for all or substantially all uses," including, but not limited to, "fish migration, rearing, spawning and harvesting". WAC 173-201-045(1)(a) and (b)(iii).

The Dosewallips River is an unappropriated perennial stream with populations of steelhead trout, and coho and chinook salmon (App. 4a, 31a, 48a). It and its tributaries are classified as Class AA. WAC 173-201-080 (32). Class AA waters are also subject to specific water quality *criteria* which define values for ascertainable factors such as fecal coliform organisms, dissolved oxygen, dissolved gas, temperature, pH, turbidity, and toxic, radioactive or deleterious material. *Id.*; WAC 173-201-045 (1)(c).

By separate statute, Washington also requires that perennial streams "shall be retained with base flows nec-

* The Washington Administrative Code ("WAC") is a compilation of administrative regulations.

essary to provide for preservation of wildlife, fish, scenic, and aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a).

B. The Elkhorn Hydroelectric Project

The Elkhorn Hydroelectric Project is a new facility which the City of Tacoma proposes to construct on the Dosewallips. It would operate in a run-of-river mode, *i.e.*, it would divert, but not impound water (App. 4a, 31a, 75a). The project would consist of a low (10-foot) diversion weir in the river, a 9-foot diameter tunnel running 1.2 miles downstream and a powerhouse containing two hydro-powered generating units rated at 8.9 MW and 4.4 MW at a head of 295 feet. The project would divert some 50 to 600 cubic feet per second ("cfs") from the river flow, depending on seasonal flows. 52 Fed. Reg. 23342 (June 19, 1987).

The area between the diversion portal and the project's tailrace (where diverted waters return to the river) is known as the bypass reach. This reach would be located in a canyon. Several fish species populate the reach. The river's flows down the five percent gradient of the proposed reach are fed by snowmelt and glacial runoff that turn the reach segment into a torrent of cascading water, except during low flow periods in August, September and October (App. 61a).

On March 18, 1986, Tacoma applied to the FERC for an original major project license. Notice of the application was published on June 19, 1987. 52 Fed. Reg. 23340, 23342. As part of the federal application process, Tacoma consulted with the Washington Departments of Ecology, Fisheries and Wildlife, the interested federal agencies (U.S. Fish and Wildlife Service and the National Marine Fisheries Service), and an Indian tribal organization, the Point No Point Treaty Council. 18 C.F.R. 4.38 (a). Processing of Tacoma's application at the FERC has been delayed pending final resolution of the disputed

streamflow conditions in the state § 401 certificate at issue.

C. Proceedings Below

1. Administrative Action

In preparing to file its license application with FERC, Tacoma considered water quantity issues affecting fish habitat in the by-pass reach. Tacoma accepted the recommendation of the agencies and tribes that it undertake an instream flow study using the Instream Flow Incremental Method (IFIM).⁹ On the basis of the study, Tacoma proposed base flows ranging between 65 and 155 cfs. The interested state and federal agencies and tribes recommended minimum flows between 100 and 200 cfs, depending on the month (App. 5a). Tacoma also applied to the state for a § 401 certificate. The Department of Ecology granted Tacoma's water quality certification request by a letter order dated June 11, 1986 (App. 82a). It imposed the flow quantities recommended by the agencies and tribes, although it expressly ruled that such quantities were not required to maintain water quality in the bypass reach.¹⁰ It explained:

While these flows are in excess of those required to maintain water quality in the bypass region, they are the flows recommend [sic] by the resource agencies and tribes for maintaining sufficient flows for the fishery resource. They are included herein as a matter of cooperation with these other agencies (App. 83a-84a).

⁹ IFIM uses a computer modeling study "to determine 'weighted usable area' in a given length of river when flows are varied. The weighted usable area is an indicator of fish habitat and hence fish production" (App. 49a).

¹⁰ A Washington statute, RCW 90.22.010 (Supp. 1992), requires the Department of Ecology to establish flows to protect fish and wildlife when requested to do so by the State departments of fish or wildlife, or when it determines that such flows are necessary to preserve water quality. It is not an EPA-approved water quality standard.

In addition, the certification imposed discharge conditions specifically related to construction of the project, and a requirement that Tacoma obtain a state water right permit prior to commencing construction (App. 84a).

Tacoma appealed the letter order to the PCHB. It moved the Board to grant it summary judgment on the ground that the base flow quantities were not justified by water quality *standards* or effluent limitations under the Clean Water Act. The Department of Ecology did not take issue with this (App. 77a). The Board concluded that the flow quantities were "not supported by, nor intended to be supported by, water quality *standards*" (App. 78a). It ruled, however, "that a Section 401 water quality certificate may include limitations to enforce all water quality—related statutes and rules including, but not limited to, water quality standards." (App. 79a). The Board subsequently denied Tacoma's second motion for summary judgment, which contended that the state-imposed flow quantities were preempted by the FPA (App. 70a).¹¹

The Board then conducted an evidentiary hearing. It concluded that the Department of Ecology's streamflow quantities were intended to be the optimum flows for the purpose of enhancing the fishery, and that such flows did not satisfy provisions of state law requiring a balancing of competing beneficial uses (App. 70a). It vacated the § 401 certificate and remanded with directions that a new certificate be issued containing Tacoma's recommended base flow quantities.

2. Judicial Proceedings

a. *Superior Court.* The State of Washington Departments of Ecology, Fisheries and Wildlife petitioned the Superior Court for review of the PCHB ruling. In a

¹¹ Tacoma cited *Rock Creek Ltd. Partnership*, 38 FERC ¶ 61,240, rehearing denied, 41 FERC ¶ 61,198 (1987), affirmed, *California v. FERC*, 877 F.2d 743 (9th Cir. 1989) affirmed, 495 U.S. 490, 110 S.Ct. 2024 (1990).

May 8, 1991 memorandum opinion, the court held that because FERC had made no determination as to the appropriate instream flow, *California v. FERC* (*supra* n.11) was inapplicable (App. 37a). The court then entered formal Findings of Fact, Conclusions of Law and Final Judgment (App. 29a). It affirmed the PCHB's decision that the minimum flow condition required by the Department of Ecology was not preempted by federal law, reversed the Board's ruling that the Department's minimum flow regime was an enhancement under state law, and reversed the Board's conclusion that state law does not permit an enhancement flow condition in the circumstances (App. 35a).

b. *Washington Supreme Court*. The Supreme Court of Washington granted Tacoma's motion for direct review and affirmed the Superior Court's judgment. (App. 5a, 28a). It held that the streamflow conditions in the § 401 certificate were necessary to assure compliance with the State's water quality standards because those standards prohibit degradation of the state's waters and particularly degradation of fish habitat and spawning in the Class AA Dosewallips (App. 7a-8a). Citing the definition of pollution in the CWA,¹² the court also held that "man-induced alteration of streamflow level is 'pollution'" (App. 8a).¹³ Finally, the court rejected Tacoma's contention "that water quality standards are limited to pollution and discharges, as opposed to streamflow levels" (App. 9a). It invoked precedents from other states holding that designated uses, including fish habitat, are an integral part of water quality standards (App. 8a-10a).

¹² "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. 1362(19).

¹³ The court cited a letter written to the FERC by an assistant administrator of the EPA to the effect that "[p]rotection of water quality involves far more than just addressing chemistry . . . relevant water quality issues include the diversity and compensation of the aquatic species . . . [and] habitat loss. . . ." (App. 8a).

In addition, the court held that application of RCW 90.54.020(3)(a) (Supp. 1992), requiring retention of base flows in perennial streams necessary to preserve fish and wildlife, was authorized by CWA § 401(d)'s provision permitting states to condition water quality certificates on "any other appropriate requirement of State law" (App. 10a-14a). The court rejected Tacoma's contention that this phrase refers only to water quality standards. The court observed that § 401(d) expressly lists §§ 301, 302, 306 and 307 of the CWA as sources for the limitations in § 401 certificates, but that § 303 relating to water quality standards, is not expressly listed. It then concluded that Congress must have intended the phrase "any other appropriate requirement of State law" to refer broadly to all state water quality-related laws, not just to § 303 state water quality standards (App. 13a).

The court also rejected Tacoma's contention that the FPA preempted the streamflow conditions in the § 401 certificate (App. 14a-22a). Finally, it held that the Department of Ecology's instream flows were not an enhancement of the fishery in the Dosewallips (App. 22a-27a).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE IMPORTANT FEDERAL QUESTION CONCERNING THE SCOPE OF A STATE'S CERTIFICATION AUTHORITY UNDER § 401 OF THE CLEAN WATER ACT

This case involves another attempt by a state to extend the carefully defined water quality certification authority delegated to the states by § 401 of the CWA. The certificate imposes stream flow quantities on operation of a hydroelectric project that is subject to comprehensive licensing and oversight by the FERC.

The flow quantities required by Washington were conceded to be "in excess of those required to maintain water quality in the bypass region" (App. 83a).

They were imposed as a matter of cooperation with state resource agencies and Indian tribes which had recommended maintenance of such flow for the fishery resource in the project's bypass reach (App. 84a).

Under § 401(d), a state water quality certification becomes a condition to any original or renewed hydroelectric license (as well as to other federal licenses or permits).¹⁴ Neither FERC nor the federal courts have authority to review the certification's requirements, even if they exceed the scope of the state's delegated authority under § 401.¹⁵ The only remedy lies in the state courts and ultimately this Court. The state courts are in conflict concerning the scope of § 401.

The FERC has recognized that "[i]t is possible for a state certifying agency to, in effect, veto a project by denying a section 401 certification request and, if challenged, have that decision sustained by state courts."¹⁶ It has also asserted that it does not "believe that a state should be permitted to use its water quality certification authority to impose conditions that are unrelated to water quality and that conflict with the Commission's licensing decisions."¹⁷ Because "review of the appropriateness of water quality certification conditions is the purview of state courts,"¹⁸ review by this Court is peti-

¹⁴ Section 401 certificates must be obtained not only for hydro-power licenses, but all other federally authorized activity whose construction or operation may result in the discharge of pollutants, e.g., gas pipelines licensed under § 7 of the Natural Gas Act, 15 U.S.C. 717, that cross rivers and wetlands; and water supply projects requiring dredge and fill permits under § 404 of the CWA.

¹⁵ See n.6 *supra*; see also e.g., *Roosevelt Campobello Int'l. Park Comm'n. v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3rd Cir. 1988).

¹⁶ *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172 (1990).

¹⁷ *Id.* at 61,173.

¹⁸ *Id.* at 61,172.

tioners' only remedy. As Tacoma asserted below, the minimum flows prescribed in this case reduce the economics of the project to infeasible levels (PCHB Tr. December 17, 1987 p. 72-73), and thus veto the project as effectively as an outright denial of the certificate.

The Washington Supreme Court concluded that "man-induced alteration of streamflow level is 'pollution'" under the CWA (App. 8a), and that state law and state water quality standards under the CWA require the prescribed streamflows in order to prevent degradation of fish habitat and spawning in the Dosewallips (App. 7a-8a). These holdings are not within the scope of § 401. They are contradicted by the plain language and history of that provision, which limits states to assuring that discharges into navigable waters will comply with requirements for the abatement and control of pollutants in such discharges.

Moreover, the ruling fails to harmonize CWA § 401 with the FPA's carefully balanced scheme for federal licensing of hydroelectric projects. It erroneously ascribes to Congress an intent to substitute state conditioning authority for FERC's comprehensive planning and licensing responsibilities. Under the court's reasoning, § 401(d) grants the 50 states virtually unlimited authority to restrict the operation of hydroelectric projects based on any state requirement related to uses of a navigable waterway. Congress, however, confined states' certificate authority to water quality standards and other limitations regulating the discharge of pollutants expressly enumerated in § 401. Section 401 conditions based on other state requirements must be appropriate to these standards and limitations. Congress did not intend § 401 to undo the basic scheme of the FPA by authorizing unrestrained intervention by the states into the licensing process. See FPA § 10(j), 16 U.S.C. 803(j); cf. *California v. FERC*, 495 U.S. 490, 110 S.Ct. 2024 (1990), *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946).

If Washington and other states are permitted to extend their § 401 authority beyond its intended limits, the economic and environmental consequences will be widespread and serious. An unnecessary, duplicative and expensive layer of State hydropower regulation will be superimposed on an already complex federal licensing scheme. Burdensome operating restrictions will prevent construction of proposed hydroelectric facilities like the Elkhorn Project and reduce capacity or force the shut-down of numerous existing projects.¹⁹ In addition, clean, renewable hydropower lost through misuse of § 401 will have to be replaced by other sources. In the Pacific Northwest, and in most other areas of the country, this will likely be power from air-polluting fossil fuel sources.

Washington is not alone. Other states have attempted to use the § 401 certification process to encroach on FERC's licensing jurisdiction. The Supreme Court of Vermont recently upheld a § 401 condition requiring spillage flows over a dam in order to render the dam site aesthetically pleasing.²⁰ In recent licensing proceedings, the FERC has noted numerous conditions in state water quality certifications which are unrelated to water quality and which pose actual or potential conflicts with the Commission's license. These have included, for example: subjecting project operations to state approval;²¹ requiring that a portion of project revenues be deposited in a special account for fish and wildlife enhancement and

¹⁹ There are almost 200 hydroelectric projects now in the FERC relicensing process, including at least 5 in Washington alone, as well as scores of others that must be relicensed in this decade. *Special Supplement 1992 Edition*, Hydrowire §§ 7-9, August 1992.

²⁰ *Georgia Pacific Corp. and Simpson Paper (Vermont) Co. Inc.*, Vt. Sup. Ct. No. 91-530, September 14, 1992, petition for a writ of certiorari pending, *Simpson Paper (Vermont) Co. v. Department of Env'tl. Control*, No. 92-1012, order inviting the views of the United States issued March 8, 1993.

²¹ *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172 (1990).

water quality management;²² and ordering the project owner to build angler's access paths and low-water stepping stone bridges that raise serious safety concerns.²³

The several state courts which have considered the scope of § 401 are divided. Courts in Connecticut, New York and Pennsylvania have properly interpreted § 401 to preclude denial of certification or imposition of conditions for reasons other than protection of water quality from polluting discharges.²⁴ The Washington Supreme Court and Supreme Court of Vermont have ruled to the contrary.²⁵

This Court should settle the important federal question presented by the need to harmonize § 401 of the CWA and Part I of the FPA. If the issue is not resolved now, other states will join Washington, Vermont, Maine,²⁶

²² *Carex Hydro*, 52 FERC ¶ 61,216 at 61,768 (1990).

²³ *Town of Summersville*, 60 FERC ¶ 61,291 at 61,990-91 (1992), reh'g denied, 63 FERC ¶ 61,037 (1993).

²⁴ *Summit Hydropower v. Commissioner of Env'tl. Protection*, CV91-050-26-43, 1992 Conn. Super. LEXIS 2177, 1992 WL 175241 (Conn. Super. July 20, 1992) (minimum spill requirement based on subjective aesthetic impact beyond the scope of state agency's § 401 authority), appeals pending Supreme Court of Connecticut Nos. SC14618 and 14619, argued May 4, 1993; *Pennsylvania Dept. of Env'tl. Resources v. City of Harrisburg*, 578 A.2d 563 (Pa. 1990) (state water quality agency exceeded its authority under § 401 by examining the impact of physical changes in the river on aquatic resources resulting from construction of a hydroelectric project and the project's effect on wetlands and fish migration); *Niagara Mohawk Power Corp. v. New York Dept. of Env. Cons.*, 187 A.D. 2d 7, 592 N.Y.S.2d 141 (NY App. Div. 1993), motion for leave to appeal granted, NY Ct. App. May 11, 1993; *In re Power Auth. v. Williams*, 457 N.E. 2d 726 (N.Y. 1983) (state certificating agency limited to determining whether hydroelectric project would meet applicable water quality standards, and was not empowered to base its decision on a balancing of need for the project against adverse environmental impacts under state energy law and master plan); see also *deRham v. Diamond*, 295 N.E.2d 763 (N.Y. 1973) (New York's high court interpreting § 401's predecessor provision).

²⁵ See *supra* n.20.

²⁶ See *supra* nn.21-22.

West Virginia²⁷ and others in using the CWA § 401 process to encroach on FERC's licensing authority during this critical decade, when hundreds of the nation's project licenses must be considered for renewal. To postpone resolution of the problem while non-water quality conditions are tested in numerous state courts can only reduce the economic use and environmental benefits of hydroelectric power. A uniform interpretation of § 401 is essential to achieve the water quality purposes of the state certification requirement, without undermining FERC's central responsibility under the FPA to evaluate and balance all aspects of a project prior to licensing or relicensing.

II. STREAMFLOW QUANTITIES FOR FISH HABITAT ARE NOT AUTHORIZED UNDER § 401 WATER QUALITY STANDARDS

The Washington Supreme Court was mistaken in holding that because a *goal* of the state's water quality standards as approved by EPA includes the protection of fish, any man-induced changes in a river's quantity of flow that impacts fish habitat may violate water quality standards under the CWA. (App. 8a). This ruling reflects a fundamental misunderstanding of the federal-state relationship created by § 303 of the CWA (33 U.S.C. 1313 (1988)) and implemented in federally-approved state water quality standards mandated by the CWA.

A state water quality standard ("WQS") must under CWA § 303(c)(2)(A) "consist of the designated *uses* of the navigable waters involved *and* the water quality *criteria* for such waters based upon such uses" (emphasis added). Propagation of fish and wildlife is an element to be taken into account in such standards, because it is among "designated uses". *Id.* EPA's regulations governing approval of state WQS under CWA § 303 impose a three-part framework on state standards: designation of

²⁷ See *supra* n.23.

uses (40 CFR 131.2, 131.6(a), 131.10 (1992)); protection of each designated use through adoption of one or more criteria (40 CFR 131.2, 131.3(b), 131.6(c), 131.11(a) (1992)); and prevention of degradation of existing water levels. Management goals, such as the promotion of fish and wildlife "values" and "uses" are to be achieved through implementation of specific, quantifiable "criteria." See 40 CFR 131.2, 131.5, 131.6, 131.10, 131.11. These criteria provide objective standards for abating and controlling the discharge of pollutants.

The management goals are not themselves enforceable water quality requirements, but rather are expressions of the ends to be promoted by specific water quality criteria. Thus, while "uses" are part of a state's WQS, including uses for aesthetics, fish and wildlife protection, and recreation, such uses must be promoted under the CWA through specific state water quality criteria for the control of pollutant discharges.

The Supreme Court of Washington erroneously obliterates § 303(c)(2)(A)'s careful distinction between "designated uses" and "criteria." The criteria are the operative water quality factors dischargers must satisfy to achieve the state's designated uses. 40 C.F.R. 131.2, 131.6(c). This distinction is patent on the face of the water quality certificate issued in this case, for the certificate concedes that the streamflow requirements imposed are in excess of levels needed to preserve water quality, and that they are intended to satisfy the fish protection goals of the various resource agencies and tribes (App. 83a-84a).

The purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251 (1988). As the terms "chemical, physical and biological" imply, that purpose is to be achieved by the abatement and control of scientifically ascertainable pollutants found in discharges into navigable waters. *Id.*²⁸ The Washington

²⁸ See *EPA v. California*, 426 U.S. 200, 202-208 (1976).

Supreme Court's holding that any man-made alteration of stream-flow is pollution, and that a state requirement may be included in a § 401 certificate so long as it is related to the use of water, is contrary to § 401's limitation to discharges of pollutants and state requirements appropriate to control of such discharges. Alteration of streamflows—in this case, diversion of water for later return unchanged some 1.2 miles downstream—is not a discharge of a pollutant. Sections 502(16) and (12) of the CWA expressly define and limit the term “discharge” to the addition of any pollutant to navigable waters from a point source.²⁹

These definitions also restrict state conditioning authority under § 401(d) to the imposition of requirements necessary to ensure that the project's discharge complies with requirements for the abatement and control of pollutants. Under § 401(a)(1), “[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters,” must obtain from the State in which the discharge will originate a certificate “that any such discharge will comply with the applicable provisions of sections [301, 302, 303, 306 and 307 of this Act]”. 33 U.S.C. 1341(a)(1). Each of the referenced sections in § 401(a) also pertains to the abatement or control of the discharge of pollutants.³⁰ Nor does the term “pol-

²⁹ Section 502(16) and (12) of the CWA, 33 U.S.C. 1362(16) and (12) provide respectively: “[t]he term ‘discharge’ when used without qualification includes a discharge of a pollutant, and a discharge of pollutants”; [t]he term “discharge of a pollutant” and the term “discharge of pollutants” means (A) any addition of any pollutant to navigable waters from any point source. . . .”

³⁰ Sections 301 and 302 set standards for effluent limitations. Section 303 governs State water quality standards and implementation plans. Section 306 sets national standards of performance for the control of discharges. Section 307 sets effluent pretreatment standards and prohibits the discharge of certain effluents.

lutant” include alteration of stream flow—it refers only to substances artificially added to water and changes in its temperature.³¹ CWA § 502(6), 33 U.S.C. 1362(6). Thus, under the plain meaning of § 401, the requirements in a water quality certification pertain to compliance with applicable standards governing a *discharge* of a pollutant or pollutants.

Examples of such requirements are found in Tacoma's § 401 certificate itself, which sets forth a number of conditions to prevent specified pollutants from entering the water during construction activity, *e.g.* petroleum products, paint, chemicals such as creosote, dredge spoils, leachates and sanitary waste. (App. 84a).

The Supreme Court of Washington's conflation of “criteria” and “designated uses” led it to conclude that fish protection goals under its water quality standards (WAC 173-201-010) are “appropriate requirement[s]” of State law under § 401(d) that support streamflow conditions in the state's § 401 certificates. But such goals, even though appropriate under § 303, are not the operative criteria regulating discharges to which § 401(d) applies. The regulation of streamflow for fish protection at a hydroelectric facility is reserved to the federal licensing process.

As the Appellate Division of the New York Supreme Court recently ruled, environmental requirements not directly related to water quality, *i.e.*, beyond narrative and numerical criteria required by EPA, are reserved by the FPA for determination at the federal level—dam safety, general balancing of economic and other concerns,

³¹ Section 502(6), 33 U.S.C. 1362(6) provides:

(6) The term “pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

the effect on wildlife, recreational opportunities and the like. *Niagara Mohawk Power Corp. v. New York State Dept. of Env't'l. Conservation*, 187 A.D. 2d 7, (N.Y. App. Div. 1993), motion for leave to appeal granted, NY Ct. of App. May 11, 1993.

The Washington Supreme Court's citation of a letter to the FERC from an Assistant EPA Administrator provides no support for its ruling. The letter simply describes EPA's position that "[p]rotection of water quality involves far more than just addressing water chemistry" (App. 8a). It does not support the court's holding that because designated uses and the prevention of the degradation of water quality are part of a state's water quality standards under § 401, they automatically displace FERC's comprehensive authority under the FPA.³²

III. SECTION 401(d)'s PROVISION FOR CONDITIONING WATER QUALITY CERTIFICATES ON "ANY OTHER APPROPRIATE REQUIREMENT OF STATE LAW" AUTHORIZES ONLY STREAMFLOW CONDITIONS APPROPRIATE TO THE WATER QUALITY LIMITATIONS AND STANDARDS ENUMERATED IN § 401

Independently of its reliance on the state's water quality standards, the Washington Supreme Court erroneously concluded that § 401(d)'s grant of authority to the states to condition water quality certificates on "any other appropriate requirement of state law" authorizes streamflow conditions based on RCW 90.54.020(3)(a) (Supp. 1992). That statute provides that "[p]erennial rivers and

³² The court also mistakenly relied on *Bangor Hydro-Electric Co. v. Board of Env't'l. Protection*, 595 A.2d 438 (Me. 1991). That case held that a state certifying agency may require an applicant for a § 401 certificate to produce information relating to the state's designated uses. The Maine Supreme Court carefully ruled, however, that "[w]e need not decide in this appeal to what extent the Board may condition water quality certification upon measures designed to promote the future attainment of designated uses", because that issue was not before the court. 595 A.2d at 443.

streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."

The court based its holding on its construction of the term "appropriate" in § 401(d), which it construed as having a breadth equivalent to the CWA's purpose, as stated in the Act's Declaration of Goals and Policy, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). This reliance on the general preamble of the CWA, rather than the specific terms in § 401(d), ignores the context and relationship of the phrase "other appropriate requirement of state law" to the other provisions enumerated in § 401.

Section 401(d) sets forth specific requirements that limit the conditions a state may include in its certification of compliance with discharge requirements. The certification must set forth effluent limitations and monitoring requirements to assure compliance with the effluent limitations and standards under §§ 301 and 302, discharge controls under § 306, pretreatment standards under § 307, "and with any other appropriate requirement of State law set forth in such certification. . . ." Water quality standards under § 303, which are specifically enumerated in § 401(a), are included in § 401(d) by its enumeration of § 301, which incorporates § 303 through subsection 301(b)(1)(C).

For the purposes of water quality standards, the "other appropriate requirement" clause in § 401(d) is *not* open to any other requirement relating to uses of the waterway, as the Washington Supreme Court held. Its context requires that it be confined to requirements appropriate to the abatement or control of the *discharge of pollutants*, i.e., appropriate to compliance with the other sections of the CWA specifically enumerated in §§ 401(a) and (d), including § 303.

It is a familiar principle of statutory construction that when general words like "other appropriate requirement" follow specific terms, then "under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it." *Cleveland v. United States*, 329 U.S. 14, 15 (1946). By relying on the broad goals of the Act, rather than the specific terms associated in § 401(d), the state court has given the phrase "any other requirement of state law" a breadth that swallows what precedes it, leaving § 401(d) limited only by the requirement that conditions thereunder be related in some way to water. *Cf. Arcadia v. Ohio Power Co.*, 498 U.S. 73, 111 S. Ct. 415, 419 (1990).³³ The sweep of this construction effectively transfers to the Department of Ecology of the State of Washington comprehensive authority over the operational flows of a hydroelectric project to be licensed under the FPA in order to achieve state policies under RCW 90.54.020(3)(a) concerning wildlife, fish, scenic, aesthetic and other environmental values, and state navigational values as well.

The court attempted to buttress its construction by asserting that the term "appropriate" could not have been limited by water quality standards in § 303 because that term is not enumerated in § 401(d). As shown above, however, this view is mistaken. Section 301—which is specifically enumerated—expressly incorporates, through subsection 301(b)(1)(C), water quality standards under the CWA, *i.e.*, under § 303.

The legislative history of § 401(d) confirms this reading. Section 401 traces its origins to § 21(b) of the Water Quality Improvement Act of 1970, P.L. 91-224, 84 Stat. 108. This statute imposed a new requirement that applicants for federal licenses or permits for activities which could result in a discharge must obtain a state

³³ See also *Hughey v. United States*, 495 U.S. 411, 110 S.Ct. 1979, 1984 (1990); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973).

certificate that the activity will not violate applicable state water quality standards. At the time, water quality standards, not restrictions on the discharge of pollutants, represented the primary safeguard against pollution.³⁴ In the Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816, Congress revamped the nation's pollution control program to establish the current system. That system focuses on the discharge of pollutants, and controls them through effluent limitations, water quality standards, standards of performance and toxic and pretreatment effluent standards embodied in §§ 301, 302, 303, 306 and 307 of the present Clean Water Act. What had been § 21(b) of the 1965 Act—which focused only on water quality standards—was expanded in § 401 "to assure that [state water quality certification authority] conforms and is consistent with the new requirements" ³⁵ Section 401 of the 1972 Act, however, did not enumerate § 303—water quality standards—among the relevant limitations and requirements for state water quality certificates. It was unnecessary to do so because § 301(b)(1)(C) expressly incorporated such standards. Nevertheless, in the ensuing administration of the Act, confusion developed as to Congressional intent concerning state conditioning authority. Congress therefore included in the Clean Water Act of 1977,³⁶ an amendment making clear that compliance with state water quality standards was a required element of a § 401 certificate. It provided:

Section 401 of the Federal Water Pollution Control Act is amended by inserting "303," after "302," in the phrase "sections 301, 302, 306, and 307 of this

³⁴ The Clean Water Act developed by legislative accretion beginning in 1948. See *EPA v. California*, 426 U.S. 200, 201 n.2 (1976).

³⁵ Federal Water Pollution Control Act Amendments of 1972, H.R. Rep. No. 911, 92nd Cong., 2d Sess. at 121-124 (1972). See also Conference Report to accompany S2770, S. Rep. No. 1236, 92nd Cong., 2d Sess. at 138 (1972).

³⁶ Clean Water Act of 1977, Pub. L. No. 95-217, § 64, 91 Stat. 1599.

Act," and in the phrase "section 301, 302, 306 or 307 of this Act", each time these phrases appear.

This concise formulation, however, had the effect of omitting § 303 from § 401(d), because in subsection (d) the sequence of the enumerated sections was interrupted by words describing those sections (App. 139a).

The omission was without significance. In the Conference Report on the 1977 amendments, the Committee explained that the omission of § 303 from other sections where sections 301, 302, 306 and 307 "are listed is in no way intended to imply that 303 is not included by reference to 301 in those other places in the Act, such as sections 301, 309, 402 and 509 and any other point where they are listed. Section 303 is always included by reference where section 301 is listed."⁸⁷ Thus, contrary to the Washington Supreme Court, the omission of § 303 from § 401(d) did not reflect a legislative purpose to make the state's ability to condition a water quality certificate under § 401(d) broader than its authority to deny it under § 401(a).

The Washington Supreme Court's failure to limit the phrase "any other appropriate requirement of state law" to the provisions enumerated in § 401(d), including § 303, and conditions appropriate to those limitations, has no basis either in the language or history of § 401(d). The same error is reflected in the case on which it principally relied: *Arnold Irrig. Dist. v. Department of Env'tl. Quality*, 79 Or. App. 136, 717 P.2d 1274, review denied, 301 Or. 765 (1986).

In *Arnold Irrigation*, the court concluded that violation of the sections enumerated in § 401(a)(1) or of state regulations issued thereunder, is the only basis on which the state may deny a water quality certificate. 717 P.2d at 1278. The court nevertheless ruled that the state could adopt as conditions under § 401(d) requirements

⁸⁷ Conference Report to accompany H.R. 3199, H. Rep. No. 830, 95th Cong., 1st Sess. at 96 (1977).

that would not justify a denial under § 401(a)(1). *Id.* It reasoned, as does the Washington Supreme Court (App. 11a-13a), that the conditioning power in § 401(d) is broader than the denial power under § 401(a)(1) because conditions in state certificates must assure compliance not only with enumerated sections but also "with any other appropriate requirement of State law", a phrase that does not appear in § 401(a)(1). This reasoning is illogical and inconsistent with the statutory scheme.

There would be no purpose to limiting denials under § 401(a)(1) to enumerated factors if § 401(d) conditions may be based on additional factors. As a practical matter, states would be able to veto the construction of projects for reasons not authorized by § 401(a)(1) simply by imposing § 401(d) conditions that render the projects infeasible. That is precisely what the Washington Department of Ecology has attempted to do with Tacoma's Elkhorn Hydroelectric Project. Washington may impose conditions under § 401(d) based on "any other appropriate requirement of State law" that is, under § 510, more stringent than federal standards for the abatement and control of pollutants. It may not, however, require water quality standards incompatible with the Act. *Cf. International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987).

IV. WASHINGTON'S EXPANSIVE READING OF § 401 WOULD SUBVERT THE FPA'S COMPREHENSIVE LICENSING SCHEME

The Washington Supreme Court's holding leaves no limitation whatever on state conditioning authority under § 401(d) except that the condition be "water-quality related." Congress did not intend § 401(d) to have this effect. Instead, it carefully limited the state's conditioning authority to compliance with the effluent limitations, water quality standards and monitoring provisions set forth in § 401(d), and state law requirements appropriate to such limitations.

The heart of the federal licensing scheme in Part I of the FPA is regulation of the use of water in navigable streams, and the balancing of hydroelectric uses with the many other purposes served by such streams. FERC must carefully consider energy conservation, navigation, irrigation, flood control, water supply, fish and wildlife protection, recreational opportunities and other aspects of environmental quality as well as power needs. A state's "water quality-related" requirements, under the Washington Supreme Court's interpretation, may involve any of these purposes. Thus, Washington's expansive reading of § 401 allows the states to subvert—indeed to completely preempt—the federal licensing scheme set forth in the FPA by shifting to the states the federal determination as to how water will be used. Except for requirements related to the discharge of pollutants under § 401, however, Congress left such determinations with FERC under Part I of the FPA.

Washington's broad reading of § 401 as applied to hydroelectric projects amounts to a partial repeal of the FPA by implication. Repeals by implication are disfavored. To the maximum extent possible, courts must read related statutes together in order to give effect to each; only when the sense and purpose of each cannot be preserved by such a reading is implied repeal recognized. *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (citing *Morton v. Mancari*, 417 U.S. 525, 549 (1974)). Limiting "any other appropriate requirement of State law" by the pollution discharge factors enumerated in §§ 401(a) and (d) gives effect to the sense and purpose of both § 401 and the FPA.

Over 40 years ago the Court in *First Iowa* rejected a state's attempt to impose a broad state permitting requirement on a hydroelectric project under the jurisdiction of the Federal Power Commission ("FPC"). The Court stated that requiring the applicant to secure a state permit would "vest in [state authorities] a veto power over the

federal project" that could "destroy the effectiveness of the Federal Act" and "subordinate to the control of the State the 'comprehensive' planning" with which the FPC was charged. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 164 (1946). The validity of the *First Iowa* holding has been reaffirmed by the Court on numerous occasions.³⁸ Its significance here is that state-imposed conditions outside the scope of § 401(d) of the CWA have the same adverse impact on the scheme of the FPA as conditions imposed solely under the state law.

This Court recently rejected an attempt by a state to undermine FERC's primary role by imposing streamflows for fish protection under § 27 of the FPA. That provision, like § 101(g) of the CWA (33 U.S.C. 1251(g)), reserves certain authority to the states regarding proprietary water rights. *California v. FERC*, 495 U.S. 490 (1990). The Court pointed out that Congress, in its 1986 amendments to the FPA,³⁹ had the opportunity to alter FERC's role *vis-a-vis* the States, but chose instead "to elaborate and reaffirm *First Iowa's* understanding that the FPA establishes a broad and paramount federal regulatory role." 495 U.S. at 499.

Among the 1986 amendments, enacted some fourteen years after § 401 of the CWA, was § 10(j) of the FPA, 16 U.S.C. 803(j). It requires FERC to adopt conditions recommended by states to protect fish and wildlife, but permits FERC to reject any such recommendation whenever it finds that it "is inconsistent with the purposes and requirements" of Part I. FPA § 10(j)(2). Congress

³⁸ *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n.6 (1982); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958); *FPC v. Oregon*, 349 U.S. 435, 444-45 (1955).

³⁹ Electric Consumers Protection Act, Pub. L. No. 99-495 (100 Stat. 1243) (1986) ("ECPA").

would not have added this provision if the states already had the authority to impose, as a water quality condition, mandatory streamflow quantities for the purpose of protecting a fishery.⁴⁰

Washington's base flow statute, RCW 90.54.020(3)(a), requiring minimum flows for fish and wildlife, scenic and aesthetic, and other environmental values and navigational values, unquestionably would fall under the FPA preemption analysis reaffirmed in *California v. FERC*. Yet the Washington Supreme Court's expansive reading of CWA § 401 would permit the State to impose the same base flow requirement through the § 401 water quality certification process. This is contrary to Congress' view of FERC's role as set forth in *California v. FERC*.

The present case is a clear example of the consequences of allowing a state water quality agency, with a relatively narrow focus and agenda, to usurp FERC's comprehensive planning role by imposing an unreasonable and burdensome § 401 condition which FERC and the federal courts are powerless to revise. If the cleanest form of energy—hydroelectric power—is denied development without the balancing of all the relevant considerations the FPA requires, neither the objectives of the CWA nor the FPA will be served.

CONCLUSION

The petition for writ of certiorari should be granted.

⁴⁰ Compare § 102(b)(6) of the CWA, 33 U.S.C. 102(b)(6), which assigns control of "storage for regulation of streamflow for the purpose of water quality control" at hydroelectric facilities to the Administrator of EPA, not to the FERC or the states. FERC may impose a license condition for such purposes only if the Administrator of EPA so recommends.

Respectfully submitted,

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APPENDICES

1a

APPENDIX A

THE SUPREME COURT OF WASHINGTON

No. 58272-6

Thurston County No. 89-2-00413-2

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES and
DEPARTMENT OF WILDLIFE,
Respondents,

v.

PUD No. 1 OF JEFFERSON COUNTY and
CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES,
Appellants.

MANDATE

THE STATE OF WASHINGTON TO: The Superior
Court of the State of Washington in and for Thurs-
ton County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 1, 1993, became the decision terminating review of this court in the above entitled cause on April 21, 1993. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No cost bills having been timely filed, costs are deemed waived.

[SEAL]

2a

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Olympia, this 3rd day of May, 1993.

/s/ C. J. Merritt
C. J. MERRITT
Clerk of the Supreme Court,
State of Washington

3a

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 58272-6

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES and
DEPARTMENT OF WILDLIFE,
Respondents,

v.

PUD No. 1 of JEFFERSON COUNTY and
CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES,
Appellants.

EN BANC

Filed Apr. 1, 1993

GUY, J.—This case arises as a result of plans of the City of Tacoma and the Jefferson County Public Utility District 1 (hereinafter Tacoma) to build a hydroelectric facility on the Dosewallips River. Federal law requires Tacoma to obtain a certificate from the Washington State Department of Ecology (Ecology) before beginning construction. Ecology granted the certificate but conditioned it upon Tacoma maintaining a certain minimum streamflow in the affected portion of the river. Tacoma argues that federal law preempts Ecology from setting this streamflow requirement, and that Ecology acted outside its authority because the requirement was designed to enhance the Dosewallips fishery rather than preserve it. We hold that there is no federal preemption and that setting the streamflow requirement was within Ecology's authority.

Facts

The Dosewallips River is a glacial stream that originates in the eastern Olympic Mountains. It flows east through the Olympic National Park, a national wilderness area, national forest land, and then private land before it empties into Hood Canal. The river is in pristine condition and supports populations of salmon, steelhead, and trout.

In 1982, Tacoma began planning to construct a hydroelectric power plant on the Dosewallips River just outside the Olympic National Park near the Elkhorn Campground. The "Elkhorn project", as it is called, will divert water from the river, use that water to run turbines to generate electricity, then return the water to the river 1.2 miles downstream. This will result in a reduction in the streamflow in the "bypass reach", which is the length of river between the initial diversion and where the water is returned downstream.

Federal law requires that Tacoma obtain a license from the Federal Energy Regulatory Commission (FERC) before beginning construction. In addition, section 401 of the federal Clean Water Act (Act), 33 U.S.C. § 1341, requires as a part of the licensing process that Tacoma obtain a water quality certificate from the State of Washington.

Tacoma applied to Ecology for the section 401 certificate in 1983. As part of the section 401 application process, Tacoma conducted a 2-year study of the effect of the Elkhorn project on fish habitat in the Dosewallips bypass reach. This study was performed in consultation with Ecology and other agencies, including the Washington State Departments of Fisheries and Wildlife, the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the Point No Point Treaty

Council. At the conclusion of the study, Tacoma proposed to maintain minimum instream flows of between 65 cubic feet per second (cfs) and 155 cfs, depending on the month. Ecology eventually issued the section 401 certificate, but conditioned it upon Tacoma maintaining instream flows of between 100 cfs and 200 cfs.

Tacoma appealed Ecology's instream flows requirement to the Pollution Control Hearings Board (Board). The Board ruled that Ecology acted within its authority in placing base flow conditions within the section 401 certificate in order to preserve the Dosewallips fishery resource. The Board then held another hearing to consider Tacoma's argument that Ecology exceeded its authority because its flow regime for the Dosewallips was designed to enhance rather than merely preserve the fishery. Two of the three Board members agreed with Tacoma's argument and so reversed the flow rates set by Ecology. The third Board member dissented on the basis that Ecology's flow rates would not enhance the fishery.

The parties cross-appealed to the Thurston County Superior Court, which ruled that Ecology is not preempted from setting minimum streamflows, that the Board erred in finding Ecology's flows would enhance the Dosewallips fishery, and that in any case Ecology has the authority to require such an enhancement. The trial court therefore reinstated Ecology's streamflow rates. We granted Tacoma's motion for direct review.

II

Ecology's Authorization under the Clean Water Act

Tacoma argues that the Federal Power Act (FPA), 16 U.S.C. § 791a *et seq.*, preempts Ecology from conditioning a section 401 certificate upon the maintenance of a minimum streamflow. Ecology contends the preemption doctrine does not apply because it was acting

under the authority granted to it by the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

We begin by addressing whether the Clean Water Act authorized Ecology to include base flow requirements in the section 401 certificate it issued to Tacoma. We conclude that it did.

A

State Water Quality Standards

Section 401 of the Clean Water Act generally requires any applicant for a federal license to obtain a state water quality certificate if the applicant's operations may result in a discharge into a waterway. 33 U.S.C. § 1341. The parties agree that Tacoma was required to obtain a 401 certificate from Ecology. The controlling provision here of section 401 is subsection (d), which provides:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title [section 301 or 302 of the Act], standard of performance under section 1316 of this title [section 306 of the Act], or prohibition, effluent standard, or pretreatment standard under section 1317 of this title [section 307 of the Act], and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1341(d). Thus, under section 401(d), the state is required to include whatever conditions are "necessary to assure" compliance with specific provisions of the Act, as well as with "any other appropriate re-

quirement of State law". The parties agree that state water quality standards qualify as appropriate requirements of state law for purposes of section 401(d), and so may serve as the source for conditions imposed in the section 401 certificate. Ecology contends that the stream-flow conditions in the 401 certificate issued to Tacoma were necessary to assure compliance with Washington's water quality standards. We agree.

The stated purposes of Washington's water quality standards include the goal of establishing such standards as are "consistent with public health and public enjoyment thereof, and the *propagation and protection of fish, shellfish, and wildlife*". (Italics ours.) WAC 173-201-010. This purpose is consistent with the Environmental Protection Agency's (EPA) declaration that state water quality standards "should, wherever attainable, provide water quality for the protection and propagation of fish." 40 C.F.R. § 130.3 (1991). The standards define an antidegradation policy for the state's waters, as required under federal regulations. WAC 173-201-035(8) (implementing 40 C.F.R. § 131.12(a) (1991)). That policy includes the principle that "[e]xisting beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." WAC 173-201-035(8)(a). The Dosewallips River is specifically identified as a "Class AA" river. WAC 173-201-080(12). The characteristic uses of a Class AA river include "fish migration, rearing, spawning, and harvesting." WAC 173-201-045(1)(b)(iii).

In short, section 401 requires states to certify compliance with state water quality standards. Washington's standards prohibit the degradation of the state's waters, and prohibit the degradation of fish habitat and spawning in the Dosewallips in particular. Therefore, section 401 required Ecology to certify that the Elkhorn project would not degrade fish habitat and spawning in the Dose-

wallips. Given that Ecology's fisheries biologists determined that the instream flows urged by Tacoma risked such degradation. Ecology therefore could not issue the 401 certificate without imposing more protective instream flow conditions. Absent such a condition, Ecology could not assure compliance with state water quality standards.

We also note that the concept of pollution in the Clean Water Act is extremely broad. Section 502(19) of the Act, 33 U.S.C. § 1362(19), reads: "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." Under this broad definition, man-induced alteration of streamflow level is "pollution". We further note a letter written by an EPA assistant administrator to the Secretary of FERC. The letter takes issue with an assertion in a FERC report that conditions related to fish, wildlife, vegetation, and recreation are inappropriate in section 401 certificates needed to obtain licenses from FERC. The letter states:

[P]rotection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system. Relevant water quality issues include . . . the diversity and composition of the aquatic species . . . [and] habitat loss . . .

Brief of Respondent, at 94 (letter from LaJuana Wilcher, Assistant Administrator of the EPA, to the Honorable Lois D. Cashell, Secretary of FERC).

Finally, other states also have water quality standards that make reference to fish and wildlife concerns, and such concerns have been held properly to require instream flow conditions in section 401 certificates. For example, in *Bangor Hydro-Elec. Co. v. Board of Env'tl. Protec.*,

595 A.2d 438 (Me. 1991), a section 401 certificate applicant argued that the Maine Board of Environmental Protection had exceeded its authority in asking for information about the project's effect upon fish habitat. The Maine Supreme Court rejected this argument and explained that under Maine's water quality standards, the "designated uses" of the affected river included fish habitat. The court stated that because these designated uses are an integral part of the state water quality standards, the Board's information request was proper. 595 A.2d at 443. Similarly, in *Hi-Line Sportsmen Club v. Milk River Irrig. Dists.*, 241 Mont. 182, 786 P.2d 13 (1990), the Montana Board of Health and Environmental Sciences issued a section 401 certificate for the construction and operation of a "siphon scheme" at a hydroelectric dam that would have raised the water temperature in the effected river. The court upheld the district court ruling that the record failed to show the project would not violate state water quality standards, which included provisions regarding the use of the river for fish habitat. 241 Mont. at 187-88. See also *Georgia-Pacific Corp. v. Vermont Dep't of Env'tl. Conservation*, 35 Env't Rep. (BNA) 2046 (Vt. Super. Ct. Oct. 4, 1991), *aff'd*, 35 Env't Rep. (BNA) 2052 (Vt. Sup. Ct. Sept. 14, 1992) (water quality standards recognized as appropriately concerning aesthetics, recreation, and wildlife).

Tacoma argues that water quality standards are limited to pollution and discharges, as opposed to stream flow levels. It is true that the standards include provisions regarding pollution discharges. See e.g., WAC 173-201-045(1)(c)(vii) (criteria for concentrations of toxic, radioactive, and deleterious materials in Class AA waters). However, as explained above, the standards' explicitly-stated antidegradation policy and classification of specific bodies of water in terms of characteristic uses, as well as the standards' broad purpose, all demonstrate

a broad concern for water quality, not just with pollution discharges. See *Bangor Hydro-Elec. Co. v. Board of Env'tl. Protec.*, *supra* (water quality standards would be a nullity if state could not consider designated uses).

B

Section 401's Integration of

"Any other Appropriate Requirement of State Law"

Ecology also maintains that the streamflow condition it imposed in Tacoma's section 401 certificate was an appropriate measure to carry out RCW 90.54.020(3)(a), which provides that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." Tacoma, joined by a group of utilities acting as amicus curiae, argues that the phrase "any other appropriate requirement of State law" refers only to state water quality standards. The Board ruled that the phrase refers to all state water quality-related statutes and rules, including, but not limited to, the water quality standards the state has adopted as required by section 303 of the Clean Water Act, 33 U.S.C. § 1313, and that Ecology's streamflow conditions were necessary to assure compliance with RCW 90.54.020(3)(a). We agree with the Board's interpretation.

We are required to interpret the words of a statute in accordance with their usual and ordinary meaning. *People's Org. for Wash. Energy Resources v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 825, 711 P.2d 319 (1985). The phrase "any other appropriate requirement of State law" contains no language to suggest its reference should be limited only to state water quality standards. Its meaning is not restricted to specific statutory or regulatory provisions, but only to those requirements of state law that are "appropriate".

The phrase's context within the Clean Water Act offers guidance as to its meaning. Most generally, Congress's broad purpose in enacting the Clean Water Act was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (a). This broad purpose suggests that what state laws qualify as "appropriate" for purposes of section 401(d) should also be understood broadly. In addition, section 401(d) expressly lists sections 301, 302, 306, and 307 of the Act as sources for the limitations in section 401 certificates. Thus, where Congress intended to refer to a specific provision, it did so. In contrast, section 303 (33 U.S.C. § 1313)—the section requiring states to adopt water quality standards—is *not* listed in section 401. If Congress intended to refer only to state water quality standards, it could have specifically referred to them. That Congress did not do so is evidence that it intended the phrase "any other appropriate requirement of State law" to refer broadly to all state water quality-related laws, not just to state water quality standards adopted pursuant to section 303.

The scope of "any other appropriate requirement of State law" was directly addressed in *Arnold Irrig. Dist. v. Department of Env'tl. Quality*, 79 Or. App. 136, 717 P.2d 1274, *review denied* 301 Or. 765 (1986). There, the Oregon Department of Environmental Quality had denied a request for a section 401 certificate on the ground that the applicants failed to provide a statement that the hydroelectric project was compatible with the country's comprehensive plan and land use ordinances. The applicants objected, saying that only water quality standards could be considered. The court rejected this on the basis explained above: if Congress had intended to make the section 303 standards the exclusive water quality criteria states may use in placing limitations in section 401 certificates, then Congress could have specifically mentioned those standards in section 401(d). 79 Or. App. at 142. The court therefore held that any

water quality related state law qualifies as an "appropriate requirement of State law" for purposes of section 401(d). 79 Or. App. at 142. *See also Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234 (S.D. Ala. 1976) (holding section 401(d) allows state to condition certification upon compliance with any requirement the state deems appropriate under state law). *But see Niagara Mohawk Power Corp. v. New York Dep't of Env'l Conservation*, — A.D.2d —, 992 N.Y.S.2d 141 (1993) (interpreting phrase within Clean Water Act in light of Congress's presumed intent in enacting FPA amendments).

The legislative history of section 401(d) further supports this interpretation. In particular, the differing treatment Congress gave sections 401(a) and 401(d) in a 1977 amendment is revealing. Generally, section 401(a) identifies specific provisions of the Clean Water Act and provides that noncompliance with any of those provisions enables a state to deny certification; section 401(d) confers authority on states to condition certification. As originally enacted in 1972 as part of the Federal Water Pollution Control Act Amendments (FWPCA), section 401(a) did not list section 303. Pub. L. No. 92-300, § 2, 86 Stat. 816, 877.79 (1972). Five years later, when Congress substantially supplemented the FWPCA by enacting the Clean Water Act, Congress amended section 401(a) to include reference to section 303. Pub. L. No. 95-217, § 64, 91 Stat. 1566, 1599 (1977). A Senate report submitted at the time explained that the purpose of the amendment was to follow the original congressional intent and to clarify that consideration of state water quality standards was part of the certification process under section 401(a). S. Rep. No. 370, 95th Cong., 1st Sess. 72-73, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4397-398. In so amending section 401(a), however, Congress failed to amend section 401(d) in the same way. As two commentators writing on this subject have explained,

[b]ecause of this omission, it seems clear that Congress did not mean to restrict conditions on certifications only to those necessary to assure compliance with section 303 water quality standards. Rather, Congress recognized a difference between the authority it provided in section 401(a)(1) to *deny* certification and that which it conferred in section 401(d) to *condition* certification. *It intended that the broader power contained in section 401(d) would allow the states to condition certification on compliance with state law provisions other than water quality standards adopted pursuant to section 303.*

(Some italics ours.) Ransel & Meyers, *State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant*, 7 Va. J. of Nat. Resources L. 339, 355 (1988).

We conclude that the phrase "any other appropriate requirement of State law" in section 401(d) does not refer only to state water quality standards. We agree with the *Arnold* court that the phrase is a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates. 79 Or. App. at 142.

We hold that the streamflow conditions Ecology included in the 401 certificate it issued to Tacoma were an appropriate measure to assure compliance with Washington's water quality standards. We also hold that a section 401 water quality certificate may include conditions to enforce all state water quality-related statutes and rules, including but not limited to, state water quality standards. Inasmuch as issues regarding water quality are not separable from issues regarding water quantity and base flow, we further hold that RCW 90.54.020(3) (a) qualifies as an "appropriate requirement of State law" for purposes of section 401(d), and therefore that Ecology's base flow limitation in the 401 certificate was

an appropriate measure to assure compliance with RCW 90.54.020(3)(a) as well as the water quality standards.

III

Federal Preemption

Having concluded that RCW 90.54.020(3)(a) and Washington's water quality standards authorize Ecology to impose streamflow conditions in section 401 certificates, we next consider Tacoma's contention that the FPA preempts Ecology's action. We reject Tacoma's preemption argument.

A.

The Threshold Requirement of State Action

The doctrine of federal preemption is based on the supremacy clause of the United States Constitution, U.S. Const., art. 6, cl. 2. Application of the doctrine presupposes as a threshold requirement some state action to be preempted by federal law. *See generally* L. Tribe, *American Constitutional Law* § 6-25 (2d ed. 1988). Here, several factors persuade us that Ecology's action in imposing a base flow condition in the 401 certificate lacks the character of state action required for federal preemption to apply.

First, a section 401 certificate is a federal permit required under the Clean Water Act, 33 U.S.C. § 1341, and in issuing this federal certificate, the state is required to set forth certain limitations. To the extent that the state's role is mandatory in these ways, the state cannot be said to be acting independently of the federal government.

Second, the sources of the streamflow limitation at issue here are state laws integrated into the Clean Water Act. In particular, Ecology's action was appropriate to assure compliance with RCW 90.54.020(3)(a) and Washington's water quality standards, which are inte-

grated into the Act as "appropriate requirement[s] of State law" under section 401(d).

Third, federal involvement in the development of state water quality standards is extensive. Those standards are required under the Clean Water Act, 33 U.S.C. § 1313. The Act requires states to devise the standards in accordance with federal regulations and to submit them to the EPA for approval. 33 U.S.C. § 1313. After the EPA approves the state's submitted standards, they become the water quality standards for the state. 33 U.S.C. § 1313(c)(3). Washington's water quality standards, in particular, have been duly adopted by the state and approved by the EPA. 50 Fed. Reg. 29,761 (1983) (noting EPA's approval of Washington's water quality standards). If a state fails to submit standards to the EPA, or if the standards it does submit are inconsistent with the Act, the EPA promulgates its own standards for the state. 33 U.S.C. § 1313(c)(4); *see also* 56 Fed. Reg. 58,477 (Nov. 19, 1991) (to be codified at 40 C.F.R. pt. 131) (proposed rulemaking by EPA to bring Washington's water quality standards into compliance with section 303(c)(2)(B) of the Act). This statutory framework gives water quality standards a hybrid character: they have the character of state laws insofar as the states initially promulgate them, but they have a federal character insofar as the EPA regulates their content and must formally approve them before they actually become the state's water quality standards. Indeed, in *Arkansas v. Oklahoma*, 503 U.S. —, 117 L. Ed. 2d 239, 257, 112 S. Ct. 1046 (1992), the Court declared that state water quality standards "are part of the federal law of water pollution control" at least insofar as they affect issuance of permits in other states. Similarly, the significant federal involvement in state water quality standards must be recognized when considering whether federal preemption applies to prevent a state from acting to assure compliance with them.

Finally, any conditions imposed in a 401 certificate become part of the federal license for which the certificate is required. Section 401(d) of the Act provides that any valid certification issued under section 401 "shall become a condition on any Federal license" for the activity in question. "FERC may not alter or reject conditions imposed by the states through section 401 certificates." *United States Dep't of the Interior v. Federal Energy Regulatory Comm'n*, 952 F.2d 538, 548 (D.C. Cir. 1992). FERC itself has recognized that the terms and conditions included in a section 401 certificate "become terms and conditions of the license as a matter of law." [Apr.-June 1990 Transfer Binder] 51 Fed. Energy Reg. Comm'n (CCH) ¶ 61,268 at 61,343. Thus, the condition at the heart of the present controversy—the condition within the 401 certificate Ecology issued to Tacoma—will be, as a matter of law, a term of whatever hydroelectric operating license FERC eventually issues to Tacoma; as such, the condition will be a part of federal law.

By including base flow limitations in the section 401 certificate it issued to Tacoma, Ecology was acting to fulfill its obligations under federal law. The section 401 certificate must assure compliance with state laws integrated into the Clean Water Act. In particular, the certificate must assure compliance with water quality standards, which are regulations the content of which was substantially determined by the EPA and which assumed the status of state water quality standards only after the EPA gave its approval. Finally, the streamflow condition, as part of the 401 certificate, also becomes a term of the FERC license by operation of law and as such a part of federal law. These factors collectively demonstrate such a significant and pervasive federal involvement that Ecology's action cannot be fairly regarded as state action for purposes of the application of federal preemption. Simply put, federal preemption doctrine does not apply in a context where a state is acting to fulfill its

federally mandated role in the comprehensive federal scheme embodied in the Clean Water Act.

B

Preemption Doctrine

Even if the threshold requirement of state action were met, the well-established principles regarding federal preemption would not support finding preemption in the present case.

As we recently observed in *Inlandboatmen's Union of the Pac. v. Department of Transp.*, 119 Wn.2d 697, 701, 836 P.2d 823 (1992), there are two well-established ways in which federal law may preempt state law: field preemption and conflict preemption. Field preemption may arise from either an explicit or an implicit expression of Congress's intent. Absent explicit preemptive language, Congress's intent to supersede state law may be implied if

- (1) a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, (2) if the federal act touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or (3) if the goals sought to be obtained or the obligations imposed reveal a purpose to preclude state authority.

Inlandboatmen's Union, at 701. Conflict preemption may arise either when compliance with both federal and state laws is physically impossible, or when state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives. *Inlandboatmen's Union*, at 702.

In the case of either field or conflict preemption, the essential inquiry is congressional intent. *Wisconsin Pub.*

Intervenor v. Mortier, 501 U.S. —, 115 L. Ed. 2d 532, 542, 111 S. Ct. 2476 (1991). In addition, "[t]here is a strong presumption against finding preemption in an ambiguous case, and the burden of proof is on the party claiming preemption." (Footnote omitted.) *Inlandboatmen's Union*, at 702.

The basis for Tacoma's preemption argument is the FPA, which empowers FERC to license projects designed to develop power from any stream or other body of water over which Congress has jurisdiction. 16 U.S.C. § 797(a). The FPA, as amended in 1986 by the Electric Consumers Protection Act, also directs that in issuing such licenses FERC must "give equal consideration to the purposes of energy conservation, the protection, mitigation of damages to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e). Congress further declared that FERC may not issue a license unless it judges the project to be "best adapted to a comprehensive plan" advancing these competing values. 15 U.S.C. § 803(a). In order to ensure this, the FPA requires FERC to consider recommendations from state and federal agencies and Indian tribes. 16 U.S.C. § 803(a)(2). In addition, in order to protect, mitigate damages to, and enhance fish and wildlife, the FPA requires FERC to adopt the recommendations of state and federal fish and wildlife agencies unless FERC believes such recommendations are inconsistent with the purposes of the FPA or other applicable law. 16 U.S.C. § 803(j)(1). FERC may reject the recommendations of state or federal fish and wildlife agencies, but it must publish its findings for doing so and state in those findings that its own conditions will comply with the FPA's standards regarding fish and wildlife protection. 16 U.S.C. § 803(j)(2).

Tacoma argues that the FPA's comprehensive scheme of licensing hydropower projects preempts Ecology from

setting streamflows in the section 401 certificate. The existence of the Clean Water Act and the authority and obligations given to the states under it make this argument unpersuasive.

Considering first field preemption, there is neither an express nor an implied indication of any congressional intent to occupy the field so as to preclude states from exercising their authority and fulfilling their obligations under the Clean Water Act. When the FPA and the Clean Water Act are considered together, the comprehensive scheme that emerges is one in which Congress left room for the states to supplement the FPA through the section 401 certification process. Enforcement of state laws is part of the federal scheme inasmuch as section 401 of the Act requires states to assure compliance with appropriate state laws. The comprehensive scheme consisting of both the Clean Water Act and the FPA presupposes rather than precludes the exercise of state authority. Consequently there is no basis for finding field preemption here.

As regards conflict preemption, there is no actual conflict between Ecology's action and the FPA. Compliance with Ecology's streamflow condition and the FPA is physically possible, and fulfillment of that condition does not stand as an obstacle to the accomplishment and execution of Congress's purposes. Indeed, exactly the same streamflow condition could have been required directly under the FPA, either by FERC directly or by FERC adopting recommendations regarding streamflow from Ecology during the licensing process. Moreover, finding conflict preemption under circumstances such as those presented here would have the effect of requiring Ecology to guess which elements of the 401 certificate might conflict with actions FERC might take at a later time, and then decline to condition the certificate based on this guess—in violation of Ecology's mandate under the Act. We cannot believe Congress could have intended to create such an administrative nightmare.

To support its preemption argument, Tacoma relies on *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990). There, FERC issued a license for a hydroelectric project and, in doing so, set a streamflow requirement in order to protect the fish in the affected portion of the river. The California Water Resources Control Board (WRCB) later issued an order requiring the licenses to conform to a higher streamflow requirement. 495 U.S. at 496. The WRCB relied on section 27 of the FPA, which provides:

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

FPA, § 27, 16 U.S.C. § 821. The Court rejected the WRCB's argument, and held that FERC's powers as granted under the FPA preempted the WRCB's attempt to set its own streamflow requirements. The Court explained that under the FPA, FERC's power is exclusive unless some power is explicitly reserved for the states, and that section 27's reservation of power does not include the power to set instream flows. According to the Court, the words of section 27 "are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." 495 U.S. at 498 (quoting *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 176, 90 L. Ed. 1143, 66 S. Ct. 906 (1946)).

Tacoma argues that Ecology is trying to do precisely what the WRCB was attempting to do in *California v. Federal Energy Regulatory Comm'n*, namely, set a minimum instream flow rate for a federally licensed power

project, and therefore Ecology is no less preempted by the FPA than was the WRCB.

The present case is distinguishable from *California v. Federal Energy Regulatory Comm'n* on two grounds. First, in *California v. Federal Energy Regulatory Comm'n*, there was an actual conflict between the federal and state governments. FERC and the California WRCB had both issued orders regarding streamflow, and those orders were in conflict. No such conflict exists in the present case. Second, in *California v. Federal Energy Regulatory Comm'n*, the Clean Water Act was not at issue or even mentioned. The issue was the scope of what powers had been saved to the states under section 27 of the FPA. The authority for California's action was not derived from federal law. Here, the issue is whether the FPA somehow precludes Ecology from exercising the authority granted it, and the responsibilities delegated to it, under the Clean Water Act. The way in which the Clean Water Act is implicated in the present case completely alters the legal context and renders untenable Tacoma's preemption argument. The presumption against finding preemption in ambiguous cases further strengthens this conclusion. See *Inlandboatmen's Union*, 119 Wn.2d at 702.

In short, whereas *California v. Federal Energy Regulatory Comm'n* presented a straightforward case of a state acting on its own authority, the present case is one in which Ecology derives authority for its action directly from federal law. State law and state action are involved only to the extent they are integrated into the Clean Water Act. Our interpretation of Ecology's duties under the Act, therefore, does not conflict with the United States Supreme Court's interpretation of the scope of the power reserved to the states under section 27 of the FPA.

We conclude that Tacoma has not carried its burden of establishing federal preemption.

The Enhancement Issue

We next consider the Board's finding that Ecology's streamflow condition for the Elkhorn project enhances the fishery in the Dosewallip River. The trial court ruled that this was error. We agree.

A

Factual Background

To understand the Board's factual ruling regarding enhancement, it is necessary to review the nature of the study conducted to determine the instream flow. After Tacoma filed its initial application with Ecology for the section 401 certificate, Ecology asked Tacoma to conduct a study to determine what level of water should be maintained in the bypass reach in order to preserve adequate habitat for fish. Ecology also requested that Tacoma perform this study using a method known as "instream flow incremental methodology", or "IFIM". Generally, the IFIM process first involves collecting data about water velocity and depth, the substrate of the river, what species of fish inhabit the river, and what developmental stages the fish go through at what times of year. The data are then assembled to enable predictions about how the water depth and velocity will change at different flow levels, and to show what depths, velocities, and substrates are most suitable for each life stage of each fish species in the river. A computer program known as "PHABSIM" (for physical habitat simulator) is then run using this assembly of data. The output of the PHABSIM program includes a set of charts or tables. Each chart or table indicates for a given fish species and a given life stage of that species the "weighted usable area" available at different flow levels. "Weighted usable area", roughly, is how much area of the river the fish can use as habitat.¹ These are then used by fisheries

¹ More specifically, "[w]eighted usable area is an index computed by multiplying the surface area of a portion of a stream by a

biologists to determine the appropriate instream flows for the river.

In the present case, Tacoma and Ecology worked together in producing the results of the IFIM study, but then disagreed as to the appropriate instream flows. Tacoma claims that fish production will be preserved using the flow regime it has proposed, but that the flow regime Ecology imposed in the section 401 certificate would actually enhance fish production. The Board agreed with Tacoma. In its findings of fact, the trial court found the Board's conclusion to be clearly erroneous.

B

Standard of Review

The Board is one of four administrative boards comprising the environmental hearings office, which is created by RCW 43.21B.005. The members of the Board are appointed by the Governor with the advice and consent of the Senate. RCW 43.21B.020. When a Board decision is rendered pursuant to a formal hearing, as was the case here, judicial review is conducted pursuant to the Administrative Procedure Act, RCW 34.04 or RCW 34.05. (Because the present case was initiated prior to July 1, 1989, RCW 34.04 applies. RCW 34.05.902.) Under RCW 34.04.130(6)(a), the court may reverse an agency's determination if it was "clearly erroneous in view of the entire record". A finding is clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire record is left with the firm and definite conviction that a mistake has been committed. *Cougar Mt. Assocs. v. King Cy.*, 111 Wn.2d 742,

weighting factor that describes the suitability of the stream for the organism of interest. It displays the surface area of stream in square feet of optimal habitat per 1,000 linear feet of stream." Cavendish & Duncan, *Use of the Instream Flow Incremental Methodology: A Tool for Negotiation*, 6 Env't Impact Assessment Rev. 347, 349 (1986).

747, 765 P.2d 264 (1988). Thus, the proper standard of review for the trial court to have used in evaluating the Board's factual determination was the clearly erroneous standard.

Furthermore, this court has stated that "[u]pon appeal from a superior court's application of the 'clearly erroneous' standard, the appellate court applies the same standard directly to the administrative decision." *Department of Ecology v. Ballard Elks Lodge* 827, 84 Wn.2d 551, 555, 527 P.2d 1121 (1974). Therefore, in the present case we apply the clearly erroneous standard directly to the Board's decision. Cf. *Schub v. Department of Ecology*, 100 Wn.2d 180, 183-84, 667 P.2d 64 (1983) (applying clearly erroneous standard directly to agency's determination rather than board's).

Finally, it is well settled that due deference must be given to the specialized knowledge and expertise of an administrative agency. E.g., *Schub*, 100 Wn.2d at 187. Here, Ecology was exercising its expertise in judging the appropriate instream flow rate for the Elkhorn project. Therefore, in analyzing the Board's decision under the clearly erroneous standard, we also give due deference to Ecology's expertise in this area.

C

The Board's Assessment of Ecology's Preservation Flow

At the hearing before the Board, there was testimony from six fisheries biologists representing five different states and federal agencies. These biologists were all involved in the IFIM study and in Ecology's setting of instream flow rates for the Dosewallips. Each expert testified that his or her intent in setting the flow rates, or the intent of the agency represented, was to preserve and protect the fishery in the Dosewallips, not to enhance

it.² In light of this testimony, it is manifestly unreasonable to believe that the agencies *intentionally* sought to enhance the Dosewallips fishery. Moreover, these experts also testified that in their opinions Ecology's flows would not in fact enhance the Dosewallips fishery. The one expert who testified for Tacoma, Phillip Hilgart, said that he could not tell whether Ecology's flow would enhance the fishery.

In light of this unrefuted testimony, the Board's conclusion that Ecology's flows would enhance the Dosewallips fishery is questionable. Apparently the Board assumed that spawning habitat is the limiting factor in fish production and then reasoned that Ecology's flow will increase fish production because it will provide more spawning habitat than is available under natural conditions. We find persuasive Ecology's position, shared by the trial court as well as the dissenting member of the 3-person Board, that this reasoning is erroneous.

First, the Board appears not to have adequately considered the uncertainty inherent in the computer modeling of the complex biological systems of the river. For example, the PHABSIM model uses only three of the many variables that determine fish habitat. The three variables PHABSIM uses are water depth, water velocity, and substrate. There was testimony before the Board, however, that there are other important flow-related habi-

² E.g., testimony of Hal Beecher, Department of Wildlife fisheries biologist, Transcript of Proceedings (Dec. 15, 1987), at 167; testimony of Kenneth Bruya, Department of Fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 138-39; testimony of Brad Caldwell, Department of Ecology fisheries biologist, Transcript of Proceedings (Dec. 16, 1987), at 104; testimony of Jean Caldwell, Department of Fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 48; testimony of Stephen Ralph, Point No Point Treaty Council fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 110; testimony of Elaine Rybak, United States Fish & Wildlife Service fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 98.

tat variables, including (1) predation, (2) competition and territoriality, (3) sedimentation and its effect on eggs and food supplies, (4) the adequacy of flows to prevent eggs from dehydrating, and (5) the creation of barriers to migration. Because PHABSIM's predictions regarding fish habitat are based on this artificial concept of habitat, Ecology's biologists were conservative in their estimation of the flows that would best protect the fishery, and there was no evidence that the flows would in fact enhance the fishery.

The Board also ignored the fact that one of the three habitat variables the PHABSIM model uses was incomplete. In particular, the PHABSIM model is designed for three measurements regarding water velocity. Because of the difficulties in getting measurements for the Dosewallips, however, only one measurement was used in the IFIM study conducted here. This further underscores the appropriateness of Ecology's conservative approach to setting minimum instream flows.

Furthermore, the Board assumed that the amount of fish habitat available under natural conditions can be reliably measured by reference to the river's "50 percent exceedence flow." The 50 percent exceedence flow for a river is that level of flow at which half the daily flows during a 1-month period are lower and half the daily flows are higher. The testimony was that for a river like the Dosewallips, the flow of which changes constantly and dramatically, the 50 percent exceedence flow may be meaningless as a measure of normal conditions. In her dissent, Board member Bendor points out that in 1 month, 210 cfs was the 50 percent exceedence flow whereas 800 cfs was the average flow.

The Board also erroneously assumed that because the computer model maximizes for an "optimum" flow regime for fish, this means that overall fish production will be increased. The record before us indicates that FHABSIM optimizes a flow regime only in the sense that for a given

species and a given life stage of that species, the model predicts at what flow the largest amount of weighted usable area of habitat will be present. Even on the sanguine assumption that maximizing weighted usable area is "optimum" for that life stage of that species, the same flow regime may not be optimum for other life stages of the same species or for other species.

Finally, the Board overlooked the uncertainty in the assumption that the limiting factor in fish production in the Dosewallips is spawning habitat. There was expert testimony, including testimony from Tacoma's expert witness Phillip Hilgert, that it is uncertain whether fish productivity in the bypass reach is spawning limited. The testimony regarding this assumption was at best equivocal. Mr. Hilgert at one point testified that "streams in Western Washington are *rearing* limited, and indeed much of the agencies' harvest management practice is based on the assumption of rearing limitations." (*Italics ours.*) Transcript of Proceedings (Dec. 16, 1987), at 33. Another expert testified he has never believed that the Dosewallips is spawning limited.

Our examination of the record leaves us with the firm and definite conviction that a mistake has been made. Ecology's intent was clearly to preserve, not to enhance, the fishery in the Dosewallips, and the Board's reasoning for its view that Ecology's flows would enhance the fishery is insupportable. Therefore we hold the Board's finding that Ecology's instream flow rates are an enhancement flow is clearly erroneous. Because we so hold, we need not reach the question whether Ecology has the authority to enhance the Dosewallips fishery by a base flow requirement in the section 401 certificate.

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V

Conclusion

We hold that federal law does not preempt Ecology from including minimum streamflow conditions in Tacoma's section 401 certificate, and that the Board erred in finding that Ecology's flows would enhance the Dosewallips fishery. We therefore conclude that the section 401 permit is valid as originally issued by Ecology. The Superior Court is affirmed.

/s/ Guy, J.

WE CONCUR:

/s/ Andersen, C.J.

/s/ Durham, J.

/s/ Utter, J.

/s/ Smith, J.

/s/ Brachtenbach, J.

/s/ Johnson, J.

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APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

— — — — —
No. 89-2-00413-2

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES, AND WILDLIFE,

Appellants,

v.

PUD No. 1 OF JEFFERSON COUNTY
and CITY OF TACOMA,

Respondents.

— — — — —
PUD No. 1 OF JEFFERSON COUNTY
and CITY OF TACOMA,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES, AND WILDLIFE,

Respondents.

— — — — —
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL JUDGMENT

[Filed Aug. 14, 1991]

This matter is an appeal of a decision of the Pollution Control Hearings Board (the Board or PCHB), PCHB No. 86-118. The PCHB conducted a full evidentiary hearing in this matter on December 15-18, 1988. In this proceeding, testimony was taken, and documentary evi-

dence was submitted. The PCHB issued its final decision on January 25, 1989.

The State Department of Ecology (respondent before the PCHB), and the State Departments of Fisheries and Wildlife (intervenors before the PCHB) appealed the decision of the PCHB to this Court on February 24, 1989. The City of Tacoma and PUD No. 1 of Jefferson County cross-appealed the PCHB's decision to this Court on March 1, 1989.

Appellant Department of Ecology has appeared in this matter by Jay J. Manning, Assistant Attorney General. Appellants Department of Fisheries and Department of Wildlife appeared by William C. Frymire, Assistant Attorney General. Cross-Appellants PUD No. 1 of Jefferson County and City of Tacoma appeared by Mark L. Bubenik, Assistant City Attorney, and Albert R. Malanca of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim for Tacoma.

This Court has reviewed the entire record produced before the PCHB, the file herein, including both parties' briefs, and has been presented with oral argument from all parties. On May 8, 1991, the Court issued a Memorandum Opinion. A copy of the Memorandum Opinion is attached as Exhibit 1 and is incorporated into this Final Judgment by this reference. Based on all of the foregoing, the Court makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT

I.

The Court hereby adopts and accepts the PCHB's Findings of Fact I-VIII, and X. These Findings of Fact are set forth below for the convenience of the reader.

Finding of Fact I

This matter concerns the Dosewalips [sic] River on the Olympic Peninsula of Washington.

Finding of Fact II

Appellants (hereafter Tacoma) propose to construct a hydroelectric project on the Dosewalips River. The project would consist of a weir which would divert water into a pipeline that parallels the course of the river but initially remains somewhat level as the river descends downstream. At the downstream end of the pipeline, water would fall through a generator and then be discharged back into the river.

Finding of Fact III

The effect of Tacoma's project would be to reduce the river flow in the segment of the Dosewalips River paralleled by the pipeline. That segment of the river is fairly steep and canyon-like. The natural flows through this "by-pass reach" are vigorous during most of the year. These natural flows are essentially undiminished by appropriation at present.

Finding of Fact IV

Tacoma's hydroelectric proposal must be licensed by the U.S. Federal Energy Regulatory Commission (FERC). Under Section 401 of the Federal Clean Water Act the respondent, Washington State Department of Ecology (DOE), must certify compliance with state water quality requirements. We have previously ruled that such a certification may include base flow limitations in the by-pass reach of the Dosewalips River pursuant to RCW 90.54.020 (3)(a) of the State Water Resources Act, of 1971. See "Order Granting Cross Motion for Summary Judgment" entered April 10, 1987.

Finding of Fact V

The base flows for the by-pass reach of the Dosewallips, as contained in DOE's Section 401 Water Quality Certification, were appealed by Tacoma. The notice of appeal was filed before us on July 11, 1986. Following pre-hearing motions, the issues remaining for hearing were reduced to the following:

1. Whether the specific base flows imposed by DOE in this instance are appropriate for the preservation of the fishery resource and related values?
2. What quantity and type of fish inhabit the waters to be affected by the base flows prescribed by DOE?

Finding of Fact VI

Taking the second issue first, we find that the by-pass reach is inhabited by steelhead and, to a lesser extent, both Coho and Chinook salmon. The quantities of these fish are sufficient to justify base flows tailored to the life cycles of those species.

Finding of Fact VII

As to the first issue, appropriateness of the DOE flow regime, we find as follows.

Finding of Fact VIII

Instream Flow Incremental Methodology. The respondents urged or required that Tacoma conduct a study of the by-pass reach using Instream Flow Incremental methodology (IFIM). This method is generally agreed to be the "state of the art" method for analyzing water flow as related to fish habitat. Under it, a computer modeling study is used to determine "weighted usable area" in a given length of river when flows are varied. The weighted usable

area is an indicator of fish habitat and hence fish production.

Finding of Fact X

Other factors than those considered in the IFIM study may affect fish production. Some may be flow related such as predation, competition, cover and out-migration. Some are not flow related, such as overharvest. These factors were not specifically evaluated in the setting of the base flows at issue. No empirical evidence regarding these factors was considered in setting the base flows.

A 1980 study, by Mathews and Olson, points out a relationship between stream flow and Coho salmon production in Puget Sound. Initially, studies showed a correlation between annual water runoff from western Washington streams and the commercial catch of Coho in western Washington. This correlation did not last over time, however. Later a similar correlation appeared between summer runoff and the Coho catch. These correlations, changing over time and global in their application to all streams of western Washington, do not materially impair the credibility of the specific IFIM studies conducted in the by-pass reach showing that flow reduction there indicates improved spawning habitat and, therefore, improved fish production potential.

II.

In Findings of Fact IX and XI, the PCHB found that the minimum flow regime required by the Department of Ecology in this matter is, in fact, an "enhancement" flow regime. In effect, the PCHB ruled that the minimum flow regime required by Ecology would in fact increase the amount of habitat available in the Dosewallips in the affected portion of the Dosewallips River and, consequently, fish production in the affected portion of the river.

In reaching this factual finding, the PCHB made a number of fundamental errors. First, the PCHB ignored the bulk of the evidence presented, most of it in the form of expert testimony presented on behalf of the respondent agencies, which supported the agencies' position that the Ecology minimum flow regime was just that, a *minimum* flow regime. This agency flow regime was designed and intended to protect and preserve the fishery resource in the affected portion of the river. The agencies neither intended nor did they in fact set a flow that would "enhance" fish habitat or fish production in the affected portion of the river.

Second, the PCHB mistakenly found a computer model's output (in the form of tables showing square feet of useable habitat at various flow levels) to be a true and accurate representation of actual fish habitat. As was explained repeatedly to the PCHB, the computer model's output, referred to as weighted useable area tables, is simply one indicator of the amount of physical habitat available which takes into account only three variables of habitat. The evidence presented to the PCHB strongly supports the agencies' position that weighted useable area is not the equivalent of habitat, but rather is only a crude indicator of the amount of habitat available.

In sum, after reviewing the entire record, this Court is left with a definite and firm conviction that the PCHB's factual finding that the agency flow regime is an enhancement flow regime is a mistake and is incorrect.

III.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, this Court now makes these

CONCLUSIONS OF LAW

The Court set forth its Conclusions of Law in the May 8, 1991, Memorandum Opinion. The Court hereby

incorporates that Memorandum Opinion, and in particular, the Conclusions of Law set forth therein.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Court enters the following:

JUDGMENT

The decision of the PCHB is affirmed in part and reversed in part. The PCHB's decision that the minimum flow condition required by Ecology in this matter is not preempted by federal law is hereby affirmed. The PCHB's decision that the Ecology-imposed minimum flow regime is an enhancement flow regime is hereby reversed. Finally, the PCHB's conclusion that RCW 90.54.020(3) does not allow an enhancement flow condition under the circumstances presented by this case is reversed.

DATED this 14th day of August, 1991.

/s/ Carol A. Fuller
CAROL A. FULLER
Judge

Presented by:

/s/ Jay J. Manning
JAY J. MANNING
Assistant Attorney General
Attorney for Dept. of Ecology

/s/ William C. Frymire
WILLIAM C. FRYMIRE
Assistant Attorney General
Attorney for Dept. of F & W

/s/ Mark L. Bubenik by Albert R. Malanca
MARK L. BUBENIK
Assistant City Attorney

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/s/ Albert R. Malanca
ALBERT R. MALANCA
Attorneys for City of Tacoma and
Jefferson County PUD No. 1

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APPENDIX D

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

No. 89-2-00413-2

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES AND WILDLIFE,
Petitioners,

v.

PUD No. 1 OF JEFFERSON COUNTY and
CITY OF TACOMA,
Respondents.

PUD No. 1 OF JEFFERSON COUNTY and
CITY OF TACOMA,
Cross-Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES AND WILDLIFE,
Cross-Respondents.

MEMORANDUM OPINION

This matter came before the Court on cross appeals from the decision of the Pollution Control Hearings Board. The petitioners are seeking review of the Board's holding that federal law does not pre-empt the actions of the agencies, while the agencies seek review of the Board's holding that the flow levels established by the agencies

constitute an enhanced environment, and, thus, an ultra vires act.

The facts in this case are as follows. In 1982, the City of Tacoma and the PUD began planning to construct a hydroelectric project at the Elkhorn site on the Dosewallips River in Jefferson County. If approved, this project will be constructed along a 1.2 mile stretch of the Dosewallips outside the Olympic National Park. It is estimated that the project will divert up to 600 cubic feet per second (cfs). The species of fish that would be affected by the diversion are steelhead trout, and coho and chinook salmon.

To build this project, the City of Tacoma is required to obtain a license from the Federal Energy Regulatory Commission (FERC). FERC, as part of the license application process, required Tacoma to obtain a Water Quality Certificate from the Washington Department of Ecology.

In acting on the application for this certificate, the Department found that an Instream Flow, Incremental Method (IFIM) study would best assist in determining what part of the natural river flow should remain along the affected portion of the river in order to protect the fisheries presently in the river. Tacoma conducted an IFIM study during the period 1983 to 1985, and as a result of the study proposed a flow regime ranging from 65 cfs to 155 cfs, depending upon the month.

Several months later, the Department proposed its own flow regime, ranging from 100 to 200 cfs. In response, Tacoma proposed a revised flow regime ranging from 65 cfs to 170 cfs.

After considering these various proposals, the Department issued the water quality certification presently under appeal. This certification required that the minimum instream flow be maintained in accordance with the

flow regime proposed by the Department, ranging from 100 cfs to 200 cfs, depending on the month.

Tacoma appealed this decision to the Washington State Pollution Control Hearings Board. The Board held that the applicable federal statute did not preempt the Department's action in setting the minimum instream flows, but did hold that the levels set by the Department were designed to enhance the fishery, and, thus, exceeded the Department's statutory authority. The parties have cross appealed on these two issues.

I. Federal Preemption

In arguing preemption, Tacoma relies primarily on *California v. FERC*, — U.S. —, 110 S.Ct. 2024 (1990) for the proposition that FERC has superior authority to establish minimum stream flows than does the Washington Department of Ecology, while recognizing the existence of 33 U.S.C. § 1341(d), the provision relied on by the Department.

33 U.S.C. § 1341(d) provides as follows:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act [33 USCS § 1311 or 1312], standard of performance under section 306 of this Act [33 USCS § 1316], or prohibition, effluent standard, or pretreatment standard under section 307 of this Act [33 USCS § 1317], and with any other appropriate requirements of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section. (Emphasis added)

While 33 U.S.C. § 1341(d) would appear, at first reading, to permit state action to protect wildlife, *California*

v. *FERC's* holding that FERC preempts state action setting higher minimum stream flows than FERC must be examined.

California is a case where the facts are very similar to those found in the present case. The Rock Creek hydroelectric project was designed to draw water from the creek and then return it to the river slightly less than a mile away. The primary issue was who was permitted to set the minimum flow rate that must remain within the bypassed section of the creek. Initially, FERC issued a license in 1983, which set interim minimum flow rates after giving consideration to the economic feasibility and environmental effects of the project. These were set in a range of 11 cfs to 15 cfs. After study, the applicant recommended that these be adopted as the permanent rates, while the California Department of Fish and Game recommended significantly higher minimum flow rates.

In the meantime, in 1984, the state water permits were issued which set the interim minimum flow rates in conformity with the FERC rates, but reserved the right to impose higher permanent rates. In 1984 the state authority suggested that the permanent minimum flow rates should be in the range 30 cfs to 60 cfs.

Finally, after an administrative hearing FERC set the permanent minimum flow rate at 20 cfs throughout the year. Four days later the state board issued an order directing the applicant to maintain the flow rates in the range 30 cfs to 60 cfs.

The Supreme Court held that the California requirements for minimum in-stream flows cannot be given effect:

As Congress directed in FPA § 10(a), FERC set the conditions of the license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project

would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would "constitute a veto of the project that was approved and licensed by FERC."

California, 110 S.Ct. at 2033.

Federal preemption of state law is governed by the intent of Congress.

Congressional intent to preempt state law may be found in three ways. First, Congress may express a clear intent to preempt state law. Second, the "scheme of federal regulation [may be] sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." Third, preemption will be found when there is an actual conflict between federal and state law where (1) compliance with both the federal and state law is physically impossible, or (2) the state law is an 'obstacle' to the "full purposes and objectives of Congress."

In Washington, there is a strong presumption against finding preemption. Preemption may be found only if federal law "clearly evinces a congressional intent to preempt state law", or there is such a " 'direct and positive' " conflict "that the two acts cannot 'be reconciled or consistently stand together'."

Labor & Industries v. Common Carriers, 111 Wn.2d 586, 588, 762 P.2d 348 (1988) (citations omitted).

Under the facts of the *California* case, the key fact in the decision was the fact that FERC had issued its determination of what the minimum instream flow rate would be prior to the action by the California Water Board. Under 33 U.S.C. § 1341, California would properly be found to be preempted. Here, on the other hand, it has not been shown that FERC has made a decision on what the minimum instream flow rates should be. Under 33 U.S.C. § 1341 it is clearly recognized that consideration should be given of state standards. See also 16 U.S.C. § 803(j)(1). Therefore, up to the point when FERC has made its determination, Washington has authority to determine what it considers to be necessary minimum instream flow rates. Since Tacoma has not shown that FERC has acted, preemption will not be found. The decision of the Board on this issue will be affirmed.

II. Minimum Instream Flow Rates

Judicial review of this case is under RCW 34.04.130, in as much as it was commenced at the administrative level prior to July 1, 1989. RCW 34.05.902. Under RCW 34.04.130(6),

the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority of jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) clearly erroneous in view of the entire record as submitted and the public policy contained in the

act of the legislature authorizing the decision or order; or

- (f) arbitrary or capricious

The Department asserts that the decision of the Board holding the flow rates proposed by the Department operated to enhance the existing fishery and were, thus, outside the Department's authority is either clearly erroneous or affected by other error of law.

A decision is clearly erroneous if, having reviewed the entire record and having considered the public policy behind the legislation, the court is left with the firm and definite conviction that a mistake has been committed. *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 765 P.2d 264 (1988). This result follows even if there is some supporting evidence for the decision. *Johns v. Employment Security*, 38 Wn.App. 566, 686 P.2d 517 (1984).

On the other hand, in reviewing under the error of law standard, the court will conduct a de novo review and may substitute its judgment for that of the agency. *Inland Empire v. Utilities & Transportation*, 112 Wn.2d 278, 770 P.2d 624 (1989).

Here the primary issue raised by this case is whether the Board was clearly erroneous in finding that the Department's proposed flow rates will enhance the natural fisheries present in the bypass portion of the river. A secondary issue is whether a flow rate that may enhance the natural fishery constitute an ultra vires action, in that it does more than preserve the natural fishery?

With respect to the primary issue, I have reviewed the entire record in this matter, and have given consideration to the public policy behind the legislation and to the arguments of counsel. This record leaves me with a firm and definite conviction that the Board erred in finding that the flow rates proposed by the Department constitute

a rate of flow which will enhance the naturally existing fishery in the Dosewallips. Since the burden of proof was on Tacoma to prove that the Department's flow rates enhanced the fishery, its failure to prove that the Department's flows did more than preserve the potential habitat existing in the river and, in fact, enhanced the natural fishery requires that the Board's decision be reversed.

Having based my decision on the first issue, it is not necessary to examine the secondary issue. However, I conclude that the Board was incorrect in concluding that a flow rate that may result in an enhancement constitutes an ultra vires action.

The statute which gives rise to this issue is RCW 90.54.020(3), which provides that

The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that the overriding considerations of the public interest will be served.

The Board concluded that the only base flows authorized by this statute are those "necessary to provide for the preservation of" fish, and that, since the base flows adopted by the Department enhanced the natural state of the river, these base flows exceeded the Department's authority. In so concluding, the Board limited the applicability of the prefatory phrase "and where possible, enhanced" to those situations where "paper water" existed, or where water rights had been abandoned in rivers which had been over-appropriated.

The Department argues that this portion of the statute is clear and unambiguous, should be given its plain and ordinary meaning, *State v. Theilken*, 102 Wn.2d 271, 684 P.2d 709 (1984), and that the conclusion of the Board limits the language of the Legislature in an unwarranted manner.

The Court must agree with the Department. While the situations suggested by the Board may be the most common situations when enhancement can occur, they are not the only situations. This river will have portions of its waters diverted. The question is to what degree. Since it is possible to fix a base flow that will enhance the fishery while still permitting development of the river, the Department correctly determined that it should fix a base flow that would optimize all varieties of fish in the river.

Dated this 8 day of May, 1991.

/s/ Carol A. Fuller
CAROL A. FULLER
Judge

APPENDIX E
BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PCHB No. 86-118

IN THE MATTER of a Section 401 Water Quality Certification granted by Department of Ecology PUD No. 1 of Jefferson County and City of Tacoma

PUD No. 1 OF JEFFERSON COUNTY, AND CITY OF
 TACOMA, DEPARTMENT OF PUBLIC UTILITIES,
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY
Respondent,
 and

STATE OF WASHINGTON DEPARTMENT OF WILDLIFE
 DEPARTMENT OF FISHERIES
Intervenors.

**REVISED FINAL FINDINGS OF FACT,
 CONCLUSIONS OF LAW AND ORDER**

This matter is the appeal of base flows contained within a Water Quality Certification, granted by respondents with respect to a hydroelectric proposal by appellants.

The matter came before the Pollution Control Hearings Board, Wick Dufford, Chairman, Lawrence J. Faulk, Member, and Judith A. Bendor, Member. William A. Harrison, Administrative Appeals Judge presided.

The hearing was conducted at Lacey, Washington, on December 15, 16, 17 and 18, 1988.

Appellants appeared by Mark L. Bubenik, Assistant City Attorney for Tacoma. Respondent, State Department of Ecology appeared by Jay J. Manning, Assistant Attorney General. Respondent Intervenors State Departments of Wildlife and Fisheries appeared by William C. Frymire, Assistant Attorney General. Reporter, Gene Barker and Associates provided court reporting services. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Witnesses were sworn and testified. Exhibits were examined. Closing Briefs were filed on February 4, 1988. From testimony heard and exhibits examined, the Pollution Control Hearings Board issued a decision on June 29, 1988, with a dissent, following. The respondents filed a Petition for Reconsideration. Appellants filed a Memorandum in Opposition. A copy of the transcript was filed. Board Member Harold S. Zimmerman has reviewed the record. After reconsideration, the Board issues this revised decision:

FINDINGS OF FACT

I

This matter concerns the Dosewalips [sic] River on the Olympic Peninsula of Washington.

II

Appellants (hereafter Tacoma) propose to construct a hydroelectric project on the Dosewalips River. The project would consist of a weir which would divert water into a pipeline that parallels the course of the river but initially remains somewhat level as the river descends downstream. At the downstream end of the pipeline, water would fall through a generator and then be discharged back into the river.

III

The effect of Tacoma's project would be to reduce the river flow in the segment of the Dosewalips River paralleled by the pipeline. That segment of the river is fairly steep and canyon-like. The natural flows through this "bypass reach" are vigorous during most of the year. These natural flows are essentially undiminished by appropriation at present.

IV

Tacoma's hydroelectric proposal must be licensed by the U.S. Federal Energy Regulatory Commission (FERC). Under Section 401 of the Federal Clean Water Act the respondent, Washington State Department of Ecology (DOE) must certify compliance with state water quality requirements. We have previously ruled that such a certification may include base flow limitations in the by-pass reach of the Dosewalips River pursuant to RCW 90.54.020(3)(a) of the State Water Resources Act, of 1971. See "Order Granting Cross Motion for Summary Judgment" entered April 10, 1987.

V

The base flows for the by-pass reach of the Dosewalips, as contained in DOE's Section 401 Water Quality Certification, were appealed by Tacoma. The notice of appeal was filed before us on July 11, 1986. Following pre-hearing motions, the issues remaining for hearing were reduced to the following:

1. Whether the specific base flows imposed by DOE in this instance are appropriate for the preservation of the fishery resource and related values?
2. What quantity and type of fish inhabit the waters to be affected by the base flows prescribed by DOE?

VI

Taking the second issue first, we find that the by-pass reach is inhabited by steelhead and, to a lesser extent,

both Coho and Chinook salmon. The quantities of these fish are sufficient to justify base flows tailored to the life cycles of those species.

VII

As to the first issue, appropriateness of the DOE flow regime, we find as follows.

VIII

Instream Flow Incremental Methodology. The respondents urged or required that Tacoma conduct a study of the by-pass reach using Instream Flow Incremental methodology (IFIM). This method is generally agreed to be the "state of the art" method for analyzing water flow as related to fish habitat. Under it, a computer modeling study is used to determine "weighted usable area" in a given length of river when flows are varied. The weighted usable area is an indicator of fish habitat and hence fish production.

IX

The respondents regard spawning as the limiting factor in fish production within the by-pass reach. The IFIM data show that when the natural, vigorous flow of river in the by-pass reach is decreased, spawning habitat actually improves. The base flows in this matter were set by selecting, in each month where spawning occurs, that flow¹ which produces 100% of the weighted usable

¹ The optimum fish flow adopted in this matter was deemed consistent, in testimony from the Department of Wildlife, with the following Department of Wildlife draft policy on instream flow:

Minimum instream flows are flows which maximize habitat for flow-dependent fish and wildlife; minimum flows are not less than optimum flows. Any reduction of flow below minimum instream flow reduces habitat. Additional flow above minimum instream flow does not increase habitat. Natural flows are sometimes less than minimum instream flow, but any prolonging of natural, subminimum instream flow will adversely impact fish and wildlife.

POL IFI, dated June 22, 1984.

area using the IFIM data. This constitutes an optimum flow regime for fish where, as here, spawning is the factor limiting further fish production. Moreover, this also constitutes a flow regime which, for fish, is potentially superior to that provided by the natural flow of the Dose-walips River in the by-pass reach.

X

Other factors than those considered in the IFIM study may affect fish production. Some may be flow related such as predation, competition, cover and out-migration. Some are not flow related, such as overharvest. These factors were not specifically evaluated in the setting of the base flows at issue. No empirical evidence regarding these factors was considered in setting the base flows.

A 1980 study, by Mathews and Olson points out a relationship between stream flow and Coho salmon production in Puget Sound. Initially, studies showed a correlation between annual water runoff from western Washington streams and the commercial catch of Coho in western Washington. This correlation did not last over time, however. Later a similar correlation appeared between summer runoff and the Coho catch. These correlations, changing over time and global in their application to all streams of western Washington, do not materially impair the credibility of the specific IFIM studies conducted in the by-pass reach showing that flow reduction there indicates improved spawning habitat and, therefore, improved fish production potential.

XI

Tacoma has proposed base flows, using the same IFIM data, that were not accepted by DOE. Tacoma's proposed base flows were selected to equal or exceed the weighted useable area provided by the natural flow of the river for all life cycles of the fish species at issue. The existing, natural flow of the river was deemed by Tacoma to be the "50% exceedence flow" in the IFIM data. This

is the median daily flow meaning half the time daily flows are more and half the time daily flows are less. Tacoma's proposed base flows provide weighted usable area equaling or exceeding that provided by the existing natural flow as depicted by the 50% exceedence flow. A summary of pertinent flows is as follows:

| Month | Existing (50% Exceedence flow) (CFS) | DOE Base Flow_ (CFS) | Tacoma's Proposed Base Flow (CFS) |
|-------|---|----------------------------|---|
| Jan. | 340 | 140 | 100 |
| Feb. | 302 | 100 | 75 |
| March | 325 | 200 | 145 |
| April | 408 | 200 | 130 |
| May | 689 | 200 | 105 |
| June | 738 | 200 | 105 |
| July | 448 | 200 | 90 |
| Aug. | 222 | 200 | 170 |
| Sept. | 159 | 150 | 150 |
| Oct. | 149 | 140 | 140 |
| Nov. | 285 | 140 | 95 |
| Dec. | 397 | 140 | 75* |

Although additional data might present a more nearly representative picture, we find that the 50% exceedance flow is an appropriate indicator of the existing flow conditions in the river. Because reduction in flows improves fish habitat to a point where further reductions reverse the trend, the IFIM data shows that existing flow and Tacoma's proposed base flows have similar habitat value while DOE's base flow has habitat value greater than either. Respondents have not made any independent determination of existing fish habitat value in setting the DOE base flow.

* Initially proposed as 65 CFS this flow was the subject of testimony at hearing during which Tacoma stipulated to the higher flow proposal to protect egg incubation.

XII

Any Conclusion of Law deemed to be a Finding of Fact is here by adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

Base flows in perennial rivers of the state are prescribed and authorized by the State Water Resources Act of 1971, Chapter 90.54 RCW. In pertinent part, that act provides at RCW 90.54.020 as follows:

90.54.020 General declaration of fundamentals for utilization and management of waters of the state

Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

(1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

(2) *Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state.* Maximum net benefits shall constitute total benefits less costs including opportunities lost.

(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) *Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.* Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served. (*Emphasis Added.*)

II

Tacoma first urges that base flows may not be set at levels which provide the optimum flow regime for fish. We agree. In *Northwest Steelhead and Salmon Council, et al. v. State Department of Ecology, et. al.*, PCHB 81-148 (1983) we concluded that base flows represent a statutory allocation for the environment to be taken out before the maximum net benefits formula is applied. In that case, however, the base flows adopted by DOE were below the optimum for fish. We concluded that flows in excess of the base flow were subject to the maximum net benefits rule, thereby potentially including flows which would be the optimum for fish. We held that:

"The maximum net benefits requirement of the WRA [Water Resources Act] does not guarantee the optimum flows for fish, nor guarantee that existing fish habitat will be enhanced. Neither does it guarantee that all flows in excess of instream [base] flows shall be available for diversion. Rather, it calls for the balancing of competing, beneficial uses." *Northwest Steelhead, supra*, at Conclusion of Law IX, p. 16. [Brackets added.]

This balancing of competing, beneficial uses applies only to the marginal flow above the base flow, and not to the base flow itself. Yet if, as here, the optimum flow regime for fish is adopted as the base flow, that optimum fish flow is guaranteed without any portion of it being subjected to the maximum net benefits test. This is not consistent with DOE's earlier adoption of base flow in *Northwest Steelhead, supra*, nor with our holding therein.

Moreover, the adoption of optimum fish flows as base flow leaves barren the statutory admonition that water uses, which by RCW 90.54.020(1) includes fish maintenance and enhancement, shall be allocated under the maximum net benefit rule of RCW 90.54.020(2). While, as DOE urges, the maximum net benefit rule applies only to "potential" uses, that limitation would exclude only certain maintenance flows, such as those adopted by DOE as base flows in *Northwest Steelhead, supra*. By contrast, the optimum fish flows adopted in this case introduce the potential for enhanced fish use in competition with the potential hydroelectric use, while impermissibly dispensing with the statutory maximum net benefits test.

The optimum fish flows adopted as base flows by DOE in this matter are inconsistent with RCW 90.54.020(2) in that the incremental portion of these flows constituting fish habitat enhancement were not subjected to a maximum net benefit test.

III

The optimum fish flows adopted as base flows by DOE are also inconsistent with the statutory authorization for base flows. Base flows, as authorized at RCW 90.54.020(3)(a), are those "necessary to provide for preservation of" fish and related values. The term "preservation" is not specifically defined, nor ambiguous. Words in a statute should be given their ordinary meaning absent ambiguity or statutory definition. *Garrison v. State Nursing Board*, 87 Wn. 2d 195, 550 P. 2d 7 (1976). Dictionaries may be used to ascertain the common meaning of statutory language. *Garrison, supra*; *East v. King County*, 22 Wn. App. 247, 589 P2d 805 (1987). The term "preservation" means "the act of preserving" while the root word "preserve", means "to keep safe from injury, harm or destruction". *Webster's Third New International Dictionary*, 1974 (1971). The evidence in this matter is that the optimum fish flows adopted as base flows enhance fish habitat beyond that provided by the river in its natural state. This is inconsistent with the statutory plan that base flows "keep safe" or preserve the fish habitat, rather than enhance it.

IV

Respondent, DOE, urges that it may enhance fish habitat through base flows because of the prefatory wording of RCW 90.54.020(3) which states:

The quality of the natural environment shall be *protected* and, *where possible, enhanced* as follows:
... (Emphasis added.)

The "preservation" language for base flows then follows at RCW 90.54.020(3)(a) as do the requirements for wastes proposed for entry into the water at RCW 90.54.020(3)(b). The prefatory wording provides that the environment shall be "protected" in all cases. The word

"protect" means "to cover or shield from that which would injure or destroy or detrimentally affect. *Webster's, supra*, 1822. Thus the term "protected" is kindred in meaning to the term "preservation" applicable to base flows. By contrast, the word "enhance" means "advance, elevate, augment, heighten or increase". *Webster's, supra*, 753. The key to understanding this prefatory wording is that while it uses the terms "protected" and "enhanced", which are distinguishable from one another, it provides for protection in all cases but provides for enhancement only "where possible".

Here it is noteworthy that the Water Resources Act of 1971, Chapter 90.54 RCW, was enacted relatively recently in the history of Washington water law. At the time of its enactment, many rivers and streams had long been subject to appropriations diverting their waters for various uses. Thus while the base flows were intended to "protect" all rivers, some were already over-appropriated to meager flow levels by 1971. In *Northwest Steelhead, supra*, summer flows in the Green River had been reduced by pre-1971 appropriations to low levels. In that matter, DOE adopted a base flow which exceeded the actual flow in the river at low summer levels. The amount by which base flow exceeds actual flow is sometimes referred to as "paper water" in recognition of the fact that it exists only on paper and not in real life. Yet the worthwhile object of establishing "paper water" is that when in the future, existing appropriators may abandon or forfeit their water rights the associated waters can be devoted to filling out the base flow, and thereby remain in the river. In this fashion the quality of a river already degraded by over-appropriation when the base flow legislation was enacted can be "enhanced" by base flows. This is the situation contemplated by the prefatory language in calling for enhancement "where possible". The matter at hand, however, is not that sit-

uation. Rather, the river at issue is flowing in its essentially natural state. Its fish producing potential may be preserved at this natural level through the adoption of base flows. But unlike a river degraded by over-appropriation, this river, in its natural state, may not be subjected to base flows calculated to enhance its natural productivity. Were that not the case, the phrase "where possible" used in connection with "enhanced" would be deprived of meaning along with the terms "protected" and "preservation". Base flows would then be wrongly understood to be enhancement flows in all instances.

We conclude that the base flows at issue enhance the fish producing potential of a river flowing in its essentially natural state, and are therefore inconsistent with RCW 90.54.020(3)(a) limiting base flows to those necessary "to provide for preservation" of fish.

V

Tacoma has shown that its proposed base flows (*see* Finding of Fact XI, above) will probably preserve the fish habitat and productivity now provided by the by-pass reach flowing in its natural state. These base flows therefore represent the correct application of RCW 90.54.020(3)(a) to the facts of this case.

VI

Other matters than fish preservation made pertinent to base flows by RCW 90.48.020(3)(a) are not, in this case, sufficient to sustain the base flows adopted by DOE nor sufficient to justify base flows greater than those proposed by Tacoma.

VII

As we have concluded earlier, base flows are only a first step in determining the ultimate allocation of water between competing uses. Nothing herein precludes the ultimate allocation of flows greater than the base flow for fish enhancement. If respondents pursue such a course

under state law, the maximum net benefits test of RCW 90.54.020(2) would apply to flows greater than base flows. If respondents pursue such a course under federal law in FERC proceedings, nothing herein is intended to indicate whether base flows are the maximum flows which ought to be allocated to fish productivity.

VIII

In reaching our conclusions in this case, we do not render any view as to whether state law should mandate, without consideration of other water uses, 1) enhancement flows to optimize fish productivity or 2) base flows necessary to preserve fish productivity. We hold only that the latter is all the state law now requires—leaving additional allocations for fish to a balancing process. Whether the law should be retained in its present form or changed is a broad question of policy properly addressed to the legislature.

IX

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

The base flows within the water quality certification are hereby vacated. This matter is remanded for reissuance of the water quality certification in accordance with this decision.

DONE at Lacey, WA this 25th day of January, 1989.

POLLUTION CONTROL HEARINGS
BOARD

/s/ Wick Dufford
WICK DUFFORD
Chairman

/s/ Harold S. Zimmerman
HAROLD S. ZIMMERMAN
Member

(Dissent)
JUDITH A. BENDOR
Member

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Law Judge

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PCHB No. 86-118

PUD No. 1 OF JEFFERSON COUNTY
and CITY OF TACOMA,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES and
DEPARTMENT OF WILDLIFE,

Respondents.

REVISED DISSENTING OPINION

The Water Quality Certification issued by the Department of Ecology ("DOE") conforms to the requirements of state law to establish base flows and should be AFFIRMED. Therefore, I dissent.

This is a simple case about what constitute adequate minimum monthly flows to preserve fish habitat in the Dosewallips River. The revised majority opinion places an insupportable reliance on a limited mathematical model, derived from only one wateryear, to determine habitat, and ignores a range of critical real-world habitat factors. Moreover, the opinion erroneously concludes that DOE's optimization of flows for *one* fish species at the spawning life stage constitutes "enhancement" of habitat for *all* fish. In light of all the evidence, the opinion effectively and improperly shifts the burden from appellants to prove that DOE's base flows are in error, onto respondent DOE to prove their base flows are correct.

In sum, the opinion is fatally flawed.

I

The Dosewallips is a river of unique beauty, with its headwaters flowing from the high glacial peaks of the eastern Olympic Mountains in the Olympic National Park. After flowing through the Park, and national forest and private lands, it empties into deep Hood Canal. The River is an important asset to the State of Washington, supporting wild and pen-reared runs of sea-run steelhead, as well as coho and chinook salmon in the upper portions, and pink and chum salmon in the lower, flatter reaches of the River. Parts of the upper River are steep, with cascades, deep plunge pools and riffles. Upstream, above the proposed project, there is an impassable waterfall preventing fish from migrating beyond. Because of the snow and glacial runoff, the River's flows fluctuate widely from month to month and from year to year.

Because the uppermost origins of the River are within the National Park, the River's water quality is significantly protected. This is a situation increasingly rare among the watersheds and waters of Washington State and specifically Hood Canal. The River is under study for possible inclusion in the Wild and Scenic Rivers List.

II

The proposed hydroelectric project consists of a diversion dam, a penstock (very large pipe), and a powerhouse. At the dam, 50 to 600 cubic feet per second ("cfs") of water from the River would be removed from a 1.2 mile stretch of the River, (between River Miles 13.8 and 12.6), in a fairly steep section known as the "bypass reach". The diverted water would flow through the penstock in a tunnel to the powerhouse where electricity would be generated.

The project does not include any storage capacity, so flows in excess of 600 cfs, the project's capacity, would

not be diverted and would remain in the River and complement any required base flows. Conversely, because of engineering constraints, when the River's flows are less than 50 cfs plus that month's required base flows, no removal of water would occur. However, at flows of 51 cfs plus base flows, all 50 cfs could be diverted, resulting in abrupt River flow changes during low flow periods.¹

The key disputed issue in this case is: what are the base flows that must be left in the River's bypass reach in order to preserve the fish?

III

DOE issued the Water Quality Certification allowing PUD No. 1 of Jefferson County and the City of Tacoma to withdraw from 50% to 90% of the River's flows, depending upon the month. By no stretch of the imagination can DOE's action, leaving in the River only 50% to 10% of the flows, be properly characterized as leaving the River in a wild state. In rebuttal, appellants propose to remove 95% of the River's flows in *all months* except September and October. (See Attachment One.)

IV

To determine what flows are required to satisfy the fish preservation base flow requirements of RCW 90.54.020(3)(a), both the DOE and appellants utilized, to varying degrees, a mathematical model known as PHABSIM (hereafter "model") in an effort to calculate fish habitat. The model is in the early developmental stages. The mathematical results were then interpreted by DOE using experts' professional judgment to derive

¹ Additional engineering constraints *may* limit such diversions, to avoid having to frequently turn the turbines on and off. However, no evidence has been presented further delineating such constraints.

base flow figures that preserve habitat. This total evaluation process is known as IFIM (hereafter "evaluation"). A basic assumption was made by all parties that preservation of habitat in fact preserved fish. Such assumption does not account for other non-flow related preservation factors, such as overfishing.

V

A stretch of the River within the bypass was chosen for PHABSIM modeling purposes. Only three physical variables were measured: water velocity, water level, and substrate (composition of the bottom). Only one set of river velocity speeds were measured and used in the model, rather than the customary three. The model then attempted to quantify habitat under different proposed flows, resulting in a number known as "weighted usable area" ("WUA"). These WUA numbers are intended to be *indicators* of habitat. Appellants' case consisted of only one witness, who conceded that the Dosewallips is "a very difficult stream" to model.

VI

The model has not been tested to determine its accuracy range or the magnitude of risk inherent. Moreover, the model cannot even compute habitat when flows exceed 600 cfs, which occurs regularly in the Dosewallips. In addition, for fish fry life stages, the model is very unreliable, attempting to dry-up the River.

The model did *not* include other important flow-related factors which are essential elements of habitat, including: predation, competition and territoriality, sedimentation and the effect on eggs and food supplies, the adequacy of flows to prevent eggs from dehydrating, and the creation of barriers to migration. A properly conducted determination of base flows for fish preservations must consider these other factors, even if the factors have not been

individually numerically quantified.² The model's numerical results must be cross-checked with real-life requirements. Unfortunately, the other opinion largely adopts these bare-bones numerical results "whole cloth".

VII

The Dosewallips River, as it currently flows undammed, provides excellent habitat for steelhead and salmon. The fish have evolutionarily adapted over the millenium to this River with its dynamic changes in flow. The following brief background on fish lifecycles provides a basis for understanding why different flows during the year are critical.

Sea-run steelhead enter the River in winter and early spring, spawning in the River in the spring. The eggs hatch and the fry and juveniles rear in the River for two years, whereupon they migrate downstream to rear in the ocean for about one and a half years before returning to spawn. Adult chinook salmon in the Dosewallips consist of spring and fall runs, with the former entering the River in April to June, staying in the River until they spawn in August-September. Fall run chinook enter in August through September and spawn in December. Their young stay in the River for about one year, before migrating to the ocean. Adult coho salmon enter the River as early as August to spawn, coincident with high flow events such as glacial runoff.

The eggs are laid in gravel in a minimum of six inches of water. With as little as 15 minutes exposure to air, eggs dry-out and de-water. This dehydration causes significant egg mortality.

² No party has done a *quantitative* baseline study for such factors. All parties concede such study would be very expensive, take many years to complete, and is not practical to do. Therefore, experts' judgments were used.

VIII

The type of habitat suitable for steelhead and salmon differs depending upon the particular life stage. Under natural conditions several life stages of fish exist in the River at the same time.

When issuing a Water Quality Certificate which allows diversion of a river's flow, given the variety of *concurrent* habitat demands, an expert determination has to be made as to *which life stage* is most flow-sensitive. That life stage is then "optimized" using the WUA habitat indicators.

All parties engaged in "optimization". DOE correctly used the spawning stages for such optimization.³ In contrast, where choices had to be made, appellants optimized for juvenile rearing.

IX

Appellants used a statistical river flow at the "50% Exceedance" level based on only one water-year, (1931-32), to derive the weighted usable area habitat indicators. Appellants erroneously concluded that such habitat indicators alone constitute "existing habitat" for purposes of base flow determination. The other opinion erroneously adopts appellants' methodology.

The 50% Exceedance ("50% E") flow is a statistical figure which the Federal Energy Regulatory Commission requires be used for hydroelectric permit applications. 50% E is also a calculation in harmony with engineering/design criteria. However, there is little credible testimony in this proceeding that the 50% E flow levels are in fact grounded in the biological habitat requirements of fish.

In addition, appellants' 50% E levels were based on 1931-32 *median* flow figures, that is: half the time in a

³ In February, when there is no spawning stage, DOE used the juvenile rearing stage.

given month in 1931-32 the flows exceeded that statistical level, and half the time they were less. In the real world, there can be a vast difference in flow levels between 50% E median flows and average (*mean*) flows, e.g., in one month 210 cfs was the median, whereas 800 cfs was the mean. In this project, appellants' base flows will reduce in-stream flows to the 95% E level; 95% of the time the in-stream flows remaining in the bypass would be less than the 1931-32 *median* flows.

X

The Washington Department of Ecology, three resource agencies—Washington State Departments of Game and of Fisheries, and the U.S. Fish and Wildlife Service—and the Indian Point No Point Treaty Council, all determined that the model-derived 50% E median flows based solely on one water-year did not sufficiently measure real-life existing habitat in the dynamic Dosewallips River. There was abundant evidence of the incorrectness of appellants' choice of solely 1931-32, one year for modeling, and their use of median figures. The other opinion's cryptic approval (at Finding of Fact XI) essentially ignores the evidence.

XI

During the evaluation stage, in addition to optimizing for the fry life stage, DOE and the other resource agencies evaluated other habitat factors in deriving the base flows.

At all life stages fish are subject to predation. When confined to less water due to lower flows, i.e., both less area and less depth, predation is likely to be enhanced and fish losses increased. Lower flows also provide less protection by decreasing the cover provided by bubbles, making the fish more visible.

With the decrease in flows, the fish are confined to smaller areas when competing for spawning territory and

for food. The abundance of a variety of food prey, including insects, is related to flow. In addition, as stream temperatures increase during the year, fish metabolism increases, as does food consumption, thereby heightening territorial conflicts resulting from lower flows.

With less flow and water velocity, water-borne sediments are deposited onto the substrate at higher rates, increasing the risk of smothering eggs and harming prey organisms. The greatest significant increase in sediment deposit occurs during intermediate flows.

At the present time, prior to diversion, there are no known barriers to fish upstream migration below or through the Dosewallips bypass reach. Decreased flows have the likely potential to create barriers by not providing sufficient water for fish to leap upstream.

Appellants' base flows rely solely on the model, and did not account for these significant habitat factors.

X [sic]

The Department of Ecology correctly exercised their responsibility to evaluate the model numbers, determined which life stage is most flow-dependent, and further evaluated real-world habitat factors in determining base flows. The Department did so in conjunction with numerous experts from several resource agencies, both state and federal. Appellants' sole witness did not prove that the Department of Ecology's base flows do more than preserve potential habitat. To the contrary, their sole witness testified that he could not conclude that the DOE base flows would enhance fish production.

Appellants have clearly not sustained their legal burden.

XI [sic]

The Water Quality Certification provides for base flows to preserve fish production potential in conformance with

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RCW 90.54.020(3)(a). Therefore, no maximum net benefits test need have been performed. Appellants have failed to prove that these are enhancement flows.

The Department of Ecology's base flows should be **AFFIRMED**.

DONE this 25th day of January, 1989.

/s/ Judith A. Bendor
JUDITH A. BENDOR,
Member

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Attachment One

| Month | Existing (50% Exceedence flow) (CFS) | DOE Base Flow (CFS) | Tacoma's Proposed Base Flow (CFS) |
|-------|---|---------------------------|---|
| Jan. | 340 | 140 | 100 |
| Feb. | 302 | 100 | 75 |
| March | 325 | 200 | 145 |
| April | 408 | 200 | 130 |
| May | 689 | 200 | 105 |
| June | 738 | 200 | 105 |
| July | 448 | 200 | 90 |
| Aug. | 222 | 200 | 170 |
| Sept. | 159 | 150 | 150 |
| Oct. | 149 | 140 | 140 |
| Nov. | 285 | 140 | 95 |
| Dec. | 397 | 140 | 75* |

* Initially proposed as 65 CFS this flow was the subject of testimony at the hearing during which Tacoma stipulated to the higher flow proposal to protect egg incubation.

APPENDIX F

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PCHB No. 86-118

PUD No. 1 OF JEFFERSON COUNTY and
CITY OF TACOMA,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Respondent.

ORDER DENYING SECOND MOTION FOR
SUMMARY JUDGMENT

On November 3, 1987, appellant City of Tacoma filed its Second Motion for Summary Judgment, together with Memorandum in Support, and Supplemental Memorandum in Support with attachment (*Rock Creek Limited Partnership*).

On November 13, 1987, respondent Department of Ecology filed its Second Cross Motion for Summary Judgment and Memorandum in Support.

On November 18, 1987, City of Tacoma filed a further attachment to its Supplemental Memorandum (*Rock Creek Limited Partnership—Order Denying Rehearing*).

Having considered these together with the file herein and being fully advised, the Board finds that there is no genuine issue of material fact and that pursuant to WAC 371-08-031(2) of the Board's procedural rules and CR

56, appellant's second motion for summary judgment should be denied and respondent's second cross motion for summary judgment should be granted.

In these second motions the undisputed facts are the same as in the first motions disposed of by our Order entered April 10, 1987, and our Order following request for reconsideration entered May 26, 1987.

Appellant's second motion reiterates arguments concerning state laws which were advanced previously and disposed of by prior Orders.

Appellant's second motion also advances a Declaratory Order of the Federal Energy Regulatory Commission entitled, *Rock Creek Limited Partnership Project* No. 3189-014. This holds that a water appropriation permit granted by California under state law and containing minimum flow limitations is pre-empted by the provisions of the Federal Power Act. That matter is distinguishable from this case where the issue concerns a certification provided by another federal statute (Clean Water Act, Section 401), rather than state law. Both the reasoning and conclusion of *Rock Creek* are inapposite to this appeal.

Wherefore the Board enters this

ORDER

Appellant City of Tacoma's Second Motion for Summary Judgment is denied. Respondent Department of Ecology's Second Cross Motion for Summary Judgment is granted.

DONE at Lacey, WA, this 9th day of December, 1987.

POLLUTION CONTROL HEARINGS
BOARD

/s/ Wick Dufford
WICK DUFFORD
Chairman

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/s/ Lawrence J. Faulk 12/8/87
LAWRENCE J. FAULK
Member

/s/ Judith A. Bendor
JUDITH A. BENDOR
Member

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

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APPENDIX G

**STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE**

April 10, 1987

Mark L. Bubenik
Assistant City Attorney
City of Tacoma
Department of Public Utilities
Tacoma, Washington 98411

Jay J. Manning
Assistant Attorney General
Department of Ecology
Mail Stop: PV-11
Olympia, WA 98504

Counselors:

Re: PCHB No. 86-118
PUD #1 OF JEFFERSON COUNTY & CITY OF TA-
COMA UTILITIES DEPARTMENT V. DOE

Enclosed is the Board's "Order Granting Cross Mo-
tion for Summary Judgment."

This is a FINAL ORDER for purposes of appeal pur-
suant to WAC 371-08-220.

Very truly yours,

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

WAH:tr
Enclosure

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

No. 86-118

IN THE MATTER of a Section 401 Water Quality
Certification granted by Department of Ecology
to PUD No. 1 of Jefferson County and
City of Tacoma

PUD NO. 1 OF JEFFERSON COUNTY, and
CITY OF TACOMA, DEPARTMENT OF
PUBLIC UTILITIES,
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Respondent.

ORDER GRANTING CROSS MOTION
FOR SUMMARY JUDGMENT

Having considered the following:

1. City of Tacoma's Motion for Summary Judgment filed December 12, 1987, together with Exhibits A, B and C and affidavits of Messrs. Philip Hilgert and Eugene Welch and Tacoma's Memorandum filed therewith.
2. Statement of Additional Authorities filed January 24, 1987, by the City of Tacoma.
3. State Department of Ecology's Cross Motion for Summary Judgment filed January 28, 1987, together with Memorandum and affidavits of Messrs. Brad

Caldwell, Walter Bergstrom, Kenneth J. Bruya, and Hal Beecher.

4. City of Tacoma's Memorandum in Reply to DOE's Memorandum in Opposition, filed February 4, 1987.

and having considered the file herein and being fully advised, the Board finds that there is no genuine issue of material fact and that pursuant to WAC 371-08-031(2) of the Board's procedural rules and CR 56, summary judgment should be granted.

The undisputed facts are as follows:

1. Appellants, Jefferson County Public Utility District No. 1 and the City of Tacoma, seek to develop a new hydroelectric power facility on the Dosewallips River of the Olympic Peninsula in Washington State.

2. Appellants must first obtain a federal license from the Federal Energy Regulatory Commission before proceeding to develop the hydroelectric facility.

3. Because the development requires a federal license, appellants must secure from the State of Washington a "water quality certification". The requirement to obtain such a certification is found within the federal Clean Water Act at Section 401 (codified as 33 U.S.C., Sec. 1341).

4. The appellants requested the Section 401 water quality certification from the state agency responsible for considering such requests, the Washington State Department of Ecology (DOE).

5. In making their request for Section 401 water quality certification, appellants described to DOE the nature of their proposed, new hydroelectric facility. It is not a traditional dam arrangement. Rather, it is a "run of the river" proposal in which water would be diverted from the Dosewallips and run through a long pipe ("penstock") running parallel to the river and downstream for

a little over one mile. The penstock, however, would remain at a relatively constant elevation while the river drops steeply below. The penstock, at its downstream end, then drops abruptly forcing its water through a power house from which the water then re-enters the river. Thus there would be some degree of "de-watering" within the one mile stretch of the river bypassed by the penstock.

6. The Dosewallips River supports a salmon and steel-head fishery. These fish presently inhabit the by-pass reach.

7. The Dosewallips River derives its origins in the high Peaks of the Olympic Range within the Olympic National Park. After flowing its course through wooded highlands it descends to discharge its waters to the Hood Canal. It is an important scenic asset of the State of Washington.

8. On June 11, 1986, DOE granted appellants request by issuing a Section 401 water quality certification. This contained a limitation, however, to which appellants object and which forms the basis of their appeal now before us. The limitation states:

5. A *State Water Right Permit* (Chapters 90.03.250 RCW and 508-12 WAC) must be obtained prior to commencing construction of the project. As a condition of this water quality certification, the project must comply with the stream flow requirements as set forth below:

| | | | | |
|-----------|-----|-----------|----|--------------|
| January | 140 | cfs | or | natural flow |
| February | 100 | cfs | or | natural flow |
| March | 200 | cfs | or | natural flow |
| April | 200 | cfs | or | natural flow |
| May | 200 | cfs | or | natural flow |
| June | 200 | crs [sic] | or | natural flow |
| July | 200 | cfs | or | natural flow |
| August | 200 | cfs | or | natural flow |
| September | 150 | cfs | or | natural flow |
| October | 140 | cfs | or | natural flow |
| November | 140 | cfs | or | natural flow |
| December | 140 | cfs | or | natural flow |

While these flows are in excess of those required to maintain water quality in the bypass region, they are the flows recommended by the resource agencies and tribes for maintaining sufficient flows for the fishery resource. They are included herein as a matter of cooperatin [sic] with these other agencies.

9. Appellants contend that DOE has exceeded its statutory authority in placing this limitation [sic]. The DOE contends that it has not.

From which the Board reaches the following conclusions:

1. The Section 401 water quality certification which appellants need from the state to proceed must certify that the discharge will comply with Sections 301, 302, 303, 306 and 307 of the federal Clean Water Act. These sections deal, so far as pertinent here, with what are known as "water quality standards" and the "effluent limitations" necessary to meet those standards.

2. Water quality *standards* have been promulgated by the state, with federal overview, under federal and state clean water acts. These standards are published at chapter 173-201 WAC and concern such things as fecal coliform, dissolved oxygen, dissolved gas, temperature, pH and other micro-characteristics. Similarly, effluent limitations are imposed by the permit system published at chapter 173-220 WAC and concern the same micro-characteristics.

3. In this matter, appellants assert that the base flow limitation in question is not justified by reference to water quality *standards* or effluent limitations. We do not understand DOE to take issue with this. See, for example, the affidavit of Mr. Walter Bergstrom who swears that in writing the words:

"... these flows are in excess of those required to maintain water quality in the bypass region . . ."

he meant and was referring to water temperature. Page 2, Lines 1-13. Water temperature is among the charac-

teristics for which there is a water quality standard, WAC 173-201-045(1)(c)(iv). We conclude that the base flow limitation in question is not supported by, nor intended to be supported by, water quality standards.

4. There is more, however, to Section 401, than certifying compliance with water quality standards or effluent limitations. Within subsection (d) of Section 401 it states:

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard [sic] of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(Emphasis added).

5. In interpreting the meaning of the statutory phrase "any other appropriate requirement of State law" we embrace with approval the interpretation taken by the Oregon Court of Appeals in *Arnold Irrigation District v. Department of Environmental Quality*, 79 Or. App. 136, 717 P.2d 1274 (1986) cited by the parties:

"Congress did not make the section 1313 [water quality] standards the exclusive water quality criteria which the states may use in placing limitations on section 1341 [water quality] certificates. If Congress had intended to do so, it could have specifically

mentioned those standards in section 1341(d) [quoted at conclusion 4. above], but it did not. Rather, it allowed the states to enforce *all* water quality—related statutes and rules through the states' authority to place limitations on section 1341 [401] certificates." P.1279 [Wording in brackets added]. *Emphasis in original.*

We see nothing in *Power Authority v. Department of Environmental Conservation* 379 F. Supp. 243 (1974), cited by appellant, which is at variance with the conclusion from *Arnold*, above. *Power Authority*, in language emphasized at page 6 of appellant's memorandum, merely memorializes the well known authority of states to adopt more restrictive standards than the federal Clean Water Act provides. This does not bear upon the distinction between technical water quality standards and other forms of state water quality legislation, nor the scope of Section 401(d) with regard to each. We conclude that a Section 401 water quality certificate may include limitations to enforce all state water quality—related statutes and rules including, but not limited to, water quality standards.

6. In 1971 the Legislature of the State of Washington enacted the Water Resources Act, chapter 90.54 RCW. By that Act it was established that:

"Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

(3) The *quality* of the natural environment shall be protected and, where possible, enhanced as follows:

(a) *Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which*

would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest would be served. RCW 90.54.020. *Emphasis added.*

Through enactment of this legislation [sic], the quality of state waters such as the Dosewallips River is not to be determined solely by peering into a microscope. Rather, the quality is affected when factors comprising the essential character of the river are affected, such as the route and quantity of the river's flow.

7. The provision of the Water Resources Act calling for preservation of base flows in perennial rivers of the state, RCW 90.54.020(3)(a), is a water quality—related state statute which is an “appropriate requirement of State law” under Section 401(d) of the federal Clean Water Act.

8. Base flow limitations of the kind at issue are an appropriate measure to carry out RCW 90.54.020(3)(a) of the Water Resources Act. We have previously sustained the practice of providing such base flows by regulatory orders or the permit issuing process in the context of water rights disputes. *Smith v. Department of Ecology*, PCHB No. 81-34 (1981) and *Northwest Steelhead and Salmon Council v. City of Tacoma*, PCHB No. 81-148 (1982). Base flow limitations are an equally appropriate measure to carry out the Water Resources Act in the context of a Section 401 water quality certification that will become a condition on a federal license.

9. The Department of Ecology acted within the authority conferred by Section 401(d) of the federal Clean Water Act in placing base flow limitations within its water quality certification for preservation of the fishery resource and related values.

Wherefore the Board enters this

ORDER

The appellant's Motion for Summary Judgment is denied. The Department of Ecology's Cross Motion for Summary Judgment is granted.

DONE at Lacey, Washington this 10th day of April, 1987.

POLLUTION CONTROL HEARINGS BOARD

/s/ Lawrence J. Faulk
LAWRENCE J. FAULK
Chairman

/s/ Wick Dufford
WICK DUFFORD
Member

/s/ Judith A. Bendor
JUDITH A. BENDOR
Member

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

APPENDIX H

[SEAL]

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
7272 Cleanwater Lane, LU-11
Olympia, Washington 98504-6811
(206) 753-2353

June 11, 1986

P.U.D. No. 1
Jefferson County Courthouse
Port Townsend, Washington 98368

Gentlemen:

Water Quality Certification Request

This letter is in response to your request for Water Quality Certification for the Elkhorn Hydroelectric Project (FERC No. 6002) Certification is hereby granted as required by Section 401 of the Federal Water Pollution Control Act, provided the following conditions are met:

1. A *Short-Term Modification to the Water Quality Criteria* (WAC 173-20-035) must be obtained from the Department of Ecology prior to the start of work in the waterway. This authorization is required when instream construction activities will unavoidably violate state water quality criteria (particularly turbidity) on a short-term basis. It will not be issued until the project is actually starting toward construction, evidenced by advertising for bids to construct. The application shall be submitted to the Southwest Regional Office of the Department of Ecology a minimum of 180 days before construction is scheduled to commence.

2. The request for a short-term modification shall include a plan of operation which identifies a sequence of construction events, together with provisions for mitigating water quality impacts, and a copy of the Hydraulics Project Approval secured from the Washington Departments of Fisheries and Game.
3. All construction contracts for this project shall contain specific provisions for water pollution control. The contracts shall also provide specific payment provisions for unanticipated water pollution control measures.
4. Prior to completion of the final project design, the applicant shall evaluate the future operation of the existing cleanout gate with respect to compliance with water quality standards during operation of this facility and submit a proposal which addresses the maintenance task of accumulated sediment removal.
5. A *State Water Right Permit* (Chapters 90.03.250 RCW and 508-12 WAC) must be obtained prior to commencing construction of the project. As a condition of this water quality certification, the project must comply with the stream flow requirements as set forth below:

| | | | | |
|-----------|-----|-----|----|--------------|
| January | 140 | cfs | or | natural flow |
| February | 100 | cfs | or | natural flow |
| March | 200 | cfs | or | natural flow |
| April | 200 | cfs | or | natural flow |
| May | 200 | cfs | or | natural flow |
| June | 200 | cfs | or | natural flow |
| July | 200 | cfs | or | natural flow |
| August | 200 | cfs | or | natural flow |
| September | 150 | cfs | or | natural flow |
| October | 140 | cfs | or | natural flow |
| November | 140 | cfs | or | natural flow |
| December | 140 | cfs | or | natural flow |

While these flows are in excess of those required to maintain water quality in the bypass region, they are the flows

recommend by the resource agencies and tribes for maintaining sufficient flows for the fishery resource. They are included herein as a matter of cooperation with these other agencies.

6. *Specific Construction Activity Conditions*

Care will be taken to prevent any petroleum products, paint, chemicals, or other harmful materials from entering the water.

All construction debris will be disposed of on land so it cannot enter state waters.

All lumber treated with creosote or other protective material will be completely dry before use in or near the waterway.

No wood waste or other organic material is to be used in any fill.

Only clean, durable riprap will be used.

Dredge spoils and/or excess excavated material shall be disposed of in a manner that prevents the spoils, leachates or drainage from the spoils, from entering state waters.

All sanitary wastes generated at the power plant during construction and operation shall be discharged to the sewerage system. Solid wastes generated at the power plant during construction and operation shall be disposed of in accordance with the regulations of the local health district.

Oil spill containment and cleanup equipment shall be on hand at the power plant at all times.

Failure to comply with the conditions described above may result in revocation of this water quality certification and issuance of civil penalties in accordance with the enforcement policies and guidelines of the Department of Ecology.

Sincerely,

/s/ Clark Haberman
CLARK HABERMAN
Regional Manager

CH:pw(WB4/5)

APPENDIX I

STATUTES INVOLVED

A. RELEVANT PROVISIONS OF THE CLEAN WATER ACT, ALSO KNOWN AS THE FEDERAL WATER POLLUTION CONTROL ACT

1. Section 301 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1311, provides:

§ 1311. Effluent limitations**(a) Illegality of pollutant discharges except in compliance with law**

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of

point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub. L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of the Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314

(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), 2(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no

case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level

radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F) of this section) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water

and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities.

(3) Limitation on authority to apply for subsection (c) modification

If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.

(4) Procedures for listing additional pollutants

(A) General authority

Upon petition of any person, the Administrator may add any pollutant to the list of pollutants for which modification under this section is authorized (except for pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) in accordance with the provisions of this paragraph.

(B) Requirements for listing

(i) Sufficient information

The person petitioning for listing of an additional pollutant under this subsection shall submit to the Administrator sufficient information to make the determinations required by this subparagraph.

(ii) Toxic criteria determination

The Administrator shall determine whether or not the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title.

(iii) Listing as toxic pollutant

If the Administrator determines that the pollutant meets the criteria for listing as a toxic pollutant under section 1317(a) of this title, the Administrator shall list the pollutant as a toxic pollutant under section 1317(a) of this title.

(iv) Nonconventional criteria determination

If the Administrator determines that the pollutant does not meet the criteria for listing as a toxic pollutant under such section and determines that adequate test methods and sufficient data are available to make the determinations required by paragraph (2) of this subsection with respect to the pollutant, the Administrator shall add the pollutant to the list of pollut-

ants specified in paragraph (1) of this subsection for which modifications are authorized under this subsection.

(C) Requirements for filing of petitions

A petition for listing of a pollutant under this paragraph—

(i) must be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title;

(ii) may be filed before promulgation of such guideline; and

(iii) may be filed with an application for a modification under paragraph (1) with respect to the discharge of such pollutant.

(D) Deadline for approval of petition

A decision to add a pollutant to the list of pollutants for which modifications under this subsection are authorized must be made within 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title.

(E) Burden of proof

The burden of proof for making the determinations under subparagraph (B) shall be on the petitioner.

(5) Removal of pollutants

The Administrator may remove any pollutant from the list of pollutants for which modifications are authorized under this subsection if

the Administrator determines that adequate test methods and sufficient data are no longer available for determining whether or not modifications may be granted with respect to such pollutant under paragraph (2) of this subsection.

(h) Modification of secondary treatment requirements

The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 1314(a)(6) of this title;

(2) the discharge of pollutants in accordance with such modified requirements will not interfere, alone or in combination with pollutants from other sources, with the attainment or maintenance of that water quality which assures protection of public water supplies and the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable, and the scope of such monitoring is limited to include only those scientific

investigations which are necessary to study the effects of the proposed discharge;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) in the case of any treatment works serving a population of 50,000 or more, with respect to any toxic pollutant introduced into such works by an industrial discharger for which pollutant there is no applicable pretreatment requirement in effect, sources introducing waste into such works are in compliance with all applicable pretreatment requirements, the applicant will enforce such requirements, and the applicant has in effect a pretreatment program which, in combination with the treatment of discharges from such works, removes the same amount of such pollutant as would be removed if such works were to apply secondary treatment to discharges and if such works had no pretreatment program with respect to such pollutant;

(7) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(8) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(9) the applicant at the time such modification becomes effective will be discharging effluent which has received at least primary or equivalent treatment and which meets the criteria established under section 1314(a)(1) of this title after initial mixing in the waters surrounding or adjacent to the point at which such effluent is discharged.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 1251(a)(2) of this title. For the purpose of paragraph (9), "primary or equivalent treatment" means treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biological oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. A municipality which applies secondary treatment shall be eligible to receive a permit pursuant to this subsection which modifies the requirements of subsection (b)(1)(B) of this section with respect to the discharge of any pollutant from any treatment works owned by such municipality into marine waters. No permit issued under this subsection shall authorize the discharge of sewage sludge into marine waters. In order for a permit to be issued under this subsection for the discharge of a pollutant into marine waters, such marine waters must exhibit characteristics assuring that water providing dilution does not contain significant amounts of previously discharged effluent from such treatment works. No permit issued under this subsec-

tion shall authorize the discharge of any pollutant into saline estuarine waters which at the time of application do not support a balanced indigenous population of shellfish, fish and wildlife, or allow recreation in and on the waters or which exhibit ambient water quality below applicable water quality standards adopted for the protection of public water supplies, shellfish, fish and wildlife or recreational activities or such other standards necessary to assure support and protection of such uses. The prohibition contained in the preceding sentence shall apply without regard to the presence or absence of a casual relationship between such characteristics and the applicant's current or proposed discharge. Notwithstanding any other provisions of this subsection, no permit may be issued under this subsection for discharge of a pollutant into the New York Bight Apex consisting of the ocean waters of the Atlantic Ocean westward of 73 degrees 30 minutes west longitude and northward of 40 degrees 10 minutes north latitude.

(i) Municipal time extensions

(1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b) (1)(B) or (b)(1)(C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this chapter available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 1342 of this title or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator

(or if appropriate the State) within 180 days after February 4, 1987. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1988, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 1281 of this title, Section 1317 of this title, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this chapter.

(2)(A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b)(1)(A) and (b)(1)(C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this chapter for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works,

and such publicly owned treatment works is presently unable to accept such discharge without con-

struction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 1342 of this title to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after December 27, 1977, or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the requirements of subsections (b)(1)(A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this chapter.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2)(A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1988; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1988, and will meet the requirements of subsections (b)(1)(B) and (C) of this section after receiving

the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 1284 of this title, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires that point source to meet all requirements under section 1317(a) and (b) of this title during the period of such time modification.

(j) Modification procedures

(1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b)(1)(B) of this section under subsection (h) of this section shall be filed not later than [sic] the 365th day which begins after December 29, 1981, except that a publicly owned treatment works which prior to December 31, 1982, had a contractual arrangement to use a portion of the capacity of an ocean outfall operated by another publicly owned treatment works which has applied for or received modification under subsection (h) of this section, may apply for a modification of subsection (h) of this section in its own right not later than 30 days after February 4, 1987;

(B) subsection (b)(2)(A) of this section as it applies to pollutants identified in subsection (b)(2)(F) of this section shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 1314 of this title or not later than

270 days after December 27, 1977, whichever is later.

(2) Subject to paragraph (3) of this section, any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this chapter, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity, or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(3) COMPLIANCE REQUIREMENTS UNDER SUBSECTION (g).—

(A) EFFECT OF FILING.—An application for a modification under subsection (g) of this section and a petition for listing of a pollutant as a pollutant for which modifications are authorized under such subsection shall not stay the requirement that the person seeking such modification or listing comply with effluent limitations under this chapter for all pollutants not the subject of such application or petition.

(B) EFFECT OF DISAPPROVAL.—Disapproval of an application for a modification under subsection (g) of this section shall not stay the

requirement that the person seeking such modification comply with all applicable effluent limitations under this chapter.

(4) DEADLINE FOR SUBSECTION (g) DECISION.—An application for a modification with respect to a pollutant filed under subsection (g) of this section must be approved or disapproved not later than 365 days after the date of such filing; except that in any case in which a petition for listing such pollutant as a pollutant for which modifications are authorized under such subsection is approved, such application must be approved or disapproved not later than 365 days after the date of approval of such petition.

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under

section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

(l) Toxic pollutants

Other than as provided in subsection (n) of this section, the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 1317(a)(1) of this title.

(m) Modification of effluent limitation requirements for point sources

(1) The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements of subsections (b)(1)(A) and (b)(2)(E) of this section, and of section 1343 of this title, with respect to effluent limitations to the extent such limitations relate to biochemical oxygen demand and pH from discharges by an industrial discharger in such State into deep waters of the territorial seas, if the applicant demonstrates and the Administrator finds that—

(A) the facility for which modification is sought is covered at the time of the enactment of this subsection by National Pollutant Discharge Elimination System permit number CA0005894 or CA0005282;

(B) the energy and environmental costs of meeting such requirements of subsection (b)(1)(A) and (b)(2)(E) of this section and sec-

tion 1343 of this title exceed by an unreasonable amount the benefits to be obtained, including the objectives of this chapter;

(C) the applicant has established a system for monitoring the impact of such discharges on a representative sample of aquatic biota;

(D) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(E) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(F) the discharge is into waters where there is strong tidal movement and other hydrological and geological characteristics which are necessary to allow compliance with this subsection and section 1251(a)(2) of this title;

(G) the applicant accepts as a condition to the permit a contractual obligation to use funds in the amount required (but not less than \$250,000 per year for ten years) for research and development of water pollution control technology, including but not limited to closed cycle technology;

(H) the facts and circumstances present a unique situation which, if relief is granted, will not establish a precedent or the relaxation of the requirements of this chapter applicable to similarly situated discharges; and

(I) no owner or operator of a facility comparable to that of the applicant situated in the United States has demonstrated that it would

be put at a competitive disadvantage to the applicant (or the parent company or any subsidiary thereof) as a result of the issuance of a permit under this subsection.

(2) The effluent limitations established under a permit issued under paragraph (1) shall be sufficient to implement the applicable State water quality standards, to assure the protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish, fauna, wildlife, and other aquatic organisms, and to allow recreational activities in and on the water. In setting such limitations, the Administrator shall take into account any seasonal variations and the need for an adequate margin of safety, considering the lack of essential knowledge concerning the relationship between effluent limitations and water quality and the lack of essential knowledge of the effects of discharges on beneficial uses of the receiving waters.

(3) A permit under this subsection may be issued for a period not to exceed five years, and such a permit may be renewed for one additional period not to exceed five years upon a demonstration by the applicant and a finding by the Administrator at the time of application for any such renewal that the provisions of this subsection are met.

(4) The Administrator may terminate a permit issued under this subsection if the Administrator determines that there has been a decline in ambient water quality of the receiving waters during the period of the permit even if a direct cause and effect relationship cannot be shown: *Provided*, That if the effluent from a source with a permit issued under this subsection is contributing to a decline in ambient water quality of the receiving waters, the Administrator shall terminate such permit.

(n) Fundamentally different factors

(1) General rule

The Administrator, with the concurrence of the State, may establish an alternative requirement under subsection (b)(2) of this section or section 1317(b) of this title for a facility that modifies the requirements of national effluent limitation guidelines or categorical pretreatment standards that would otherwise be applicable to such facility, if the owner or operator of such facility demonstrates to the satisfaction of the Administrator that—

(A) the facility is fundamentally different with respect to the factors (other than cost) specified in section 1314(b) or 1314 (g) of this title and considered by the Administrator in establishing such national effluent limitation guidelines or categorical pretreatment standards;

(B) the application—

(i) is based solely on information and supporting data submitted to the Administrator during the rulemaking for establishment of the applicable national effluent limitation guidelines or categorical pretreatment standard specifically raising the factors that are fundamentally different for such facility; or

(ii) is based on information and supporting data referred to in clause (i) and information and supporting data the applicant did not have a reasonable opportunity to submit during such rulemaking;

(C) the alternative requirement is no less stringent than justified by the fundamental difference; and

(D) the alternative requirement will not result in a non-water quality environmental impact which is markedly more adverse than the impact considered by the Administrator in establishing such national effluent limitation guideline or categorical pretreatment standard.

(2) Time limit for applications

An application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection must be submitted to the Administrator within 180 days after the date on which such limitation or standard is established or revised, as the case may be.

(3) Time limit for decision

The Administrator shall approve or deny by final agency action an application submitted under this subsection within 180 days after the date such application is filed with the Administrator.

(4) Submission of information

The Administrator may allow an applicant under this subsection to submit information and supporting data until the earlier of the date the application is approved or denied or the last day that the Administrator has to approve or deny such application.

(5) Treatment of pending applications

For the purposes of this subsection, an application for an alternative requirement based on fundamentally different factors which is pending on February 4, 1987, shall be treated as having been submitted to the Administrator on the 180th day following February 4, 1987. The applicant may amend the application to take into account the provisions of this subsection.

(6) Effect of submission of application

An application for an alternative requirement under this subsection shall not stay the applicant's obligation to comply with the effluent limitation guideline or categorical pretreatment standard which is the subject of the application.

(7) Effect of denial

If an application for an alternative requirement which modifies the requirements of an effluent limitation or pretreatment standard under this subsection is denied by the Administrator, the applicant must comply with such limitation or standard as established or revised, as the case may be.

(8) Reports

Every 6 months after February 4, 1987, the Administrator shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives a report on the status of applications for alternative requirements which modify the requirements of effluent limitations under section 1311 or 1314 of this title or any national categorical

pretreatment standard under section 1317(b) of this title filed before, on, or after February 4, 1987.

(o) Application fees

The Administrator shall prescribe and collect from each applicant fees reflecting the reasonable administrative costs incurred in reviewing and processing applications for modifications submitted to the Administrator pursuant to subsections (c), (g), (i), (k), (m), and (n) of this section, section 1314(d)(4) of this title, and section 1326(a) of this title. All amounts collected by the Administrator under this subsection shall be deposited into a special fund of the Treasury entitled "Water Permits and Related Services" which shall thereafter be available for appropriation to carry out activities of the Environmental Protection Agency for which such fees were collected.

(p) Modified permit for coal remining operations

(1) In general

Subject to paragraphs (2) through (4) of this subsection, the Administrator, or the State in any case which the State has an approved permit program under section 1342(b) of this title, may issue a permit under section 1342 of this title which modifies the requirements of subsection (b)(2)(A) of this section with respect to the pH level of any pre-existing discharge, and with respect to pre-existing discharges of iron and manganese from the remined area of any coal remining operation or with respect to the pH level or level of iron or manganese in any pre-existing discharge affected by the remining operation. Such modi-

fied requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit.

(2) Limitations

The Administrator or the State may only issue a permit pursuant to paragraph (1) if the applicant demonstrates to the satisfaction of the Administrator or the State, as the case may be, that the coal remining operation will result in the potential for improved water quality from the remining operation but in no event shall such a permit allow the pH level of any discharge, and in no event shall such a permit allow the discharges of iron and manganese, to exceed the levels being discharged from the remined area before the coal remining operation begins. No discharge from, or affected by, the remining operation shall exceed State water quality standards established under section 1313 of this title.

(3) Definitions

For purposes of this subsection—

(A) Coal remining operation

The term "coal remining operation" means a coal mining operation which begins after February 4, 1987 at a site on which coal mining was conducted before August 3, 1977.

(B) Remined area

The term "remined area" means only that area of any coal remining operation

on which coal mining was conducted before August 3, 1977.

(C) Pre-existing discharge

The term "pre-existing discharge" means any discharge at the time of permit application under this subsection.

(4) Applicability of strip mining laws

Nothing in this subsection shall affect the application of the Surface Mining Control and Reclamation Act of 1977 [30 U.S.C. 1201 et seq.] to any coal remining operation, including the application of such Act to suspended solids.

2. Section 302 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1312, provides:

§ 1312. Water quality related effluent limitations

(a) Establishment

Whenever, in the judgment of the Administrator or as identified under section 1314(l) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be

expected to contribute to the attainment or maintenance of such water quality.

(b) Modifications of effluent limitations

(1) Notice and hearing

Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.

(2) Permits

(A) No reasonable relationship

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.

(B) Reasonable progress

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for toxic pollutants for a single period not to exceed 5 years if the applicant demonstrates to the satisfaction of the Administrator

that such modified requirements (i) will represent the maximum degree of control within the economic capability of the owner and operator of the source, and (ii) will result in reasonable further progress beyond the requirements of section 1311(b) (2) of this title toward the requirements of subsection (a) of this section.

(c) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

3. Section 303 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1313, provides:

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is a waiting [sic] approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of

such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately

prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable

water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standards shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the state, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other per-

mit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal

water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection

and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(4) LIMITATIONS ON REVISION OF CERTAIN EFFLUENT LIMITATIONS.—

(A) STANDARD NOT ATTAINED.—For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) STANDARD ATTAINED.—For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.

4. Section 306 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1316, provides:

§ 1316. National standards of performance**(a) Definitions**

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflect the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

- pulp and paper mills;
- paperboard, builders paper and board mills;
- meat product and rendering processing;
- dairy product processing;
- grain mills;
- canned and preserved fruits and vegetables processing;
- canned and preserved seafood processing;
- sugar processing;
- textile mills;
- cement manufacturing;
- feedlots;
- electroplating;
- organic chemicals manufacturing;
- inorganic chemicals manufacturing;
- plastic and synthetic materials manufacturing;
- soap and detergent manufacturing;
- fertilizer manufacturing;
- petroleum refining;
- iron and steel manufacturing;
- nonferrous metals manufacturing;
- phosphate manufacturing;
- steam electric powerplants;

ferroalloy manufacturing;
 leather tanning and finishing;
 glass and asbestos manufacturing;
 rubber processing; and
 timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality, environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) State enforcement of standards of performance

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Protection from more stringent standards

Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of title 26 whichever period ends first.

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

5. Section 307 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1317, provides:

§ 1317. Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after December 27, 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2) (A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for

a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard.

Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly

attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

(b) Pretreatment standards hearing; promulgation; compliance period; revision; application to State and local laws

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works. If, in the case of any toxic pollutant under subsection (a) of this section introduced by a source into a publicly owned treatment works, the treatment by such works removes all or any part

of such toxic pollutant and the discharge from such works does not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by such source other than through a publicly owned treatment works, and does not prevent sludge use or disposal by such works in accordance with section 1345 of this title, then the pretreatment requirements for the sources actually discharging such toxic pollutant into such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) New sources of pollutants into publicly owned treatment works

In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously

with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

(d) Operation in violation of standards unlawful

After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

(e) Compliance date extension for innovative pretreatment systems

In the case of any facility that proposes to comply with the pretreatment standards of subsection (b) of this section by applying an innovative system that meets the requirements of section 1311(k) of this title, the owner or operator of the publicly owned treatment works receiving the treated effluent from such facility may extend the date for compliance with the applicable pretreatment standard established under this section for a period not to exceed 2 years—

(1) if the Administrator determines that the innovative system has the potential for industry-wide application, and

(2) if the Administrator (or the State in consultation with the Administrator, in any case in which the State has a pretreatment program approved by the Administrator)—

(A) determines that the proposed extension will not cause the publicly owned

treatment works to be in violation of its permit under section 1342 of this title or of section 1345 of this title or to contribute to such a violation, and

(B) concurs with the proposed extension.

6. Section 401 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1341, provides:

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable water at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under section 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures

for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any

such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with re-

spect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under

this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

7. Section 510 of the Clean Water Act, also known as the Federal Water Pollution Control Act, as codified at 33 U.S.C. § 1370, provides:

§ 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the

right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right of jurisdiction of the States with respect to the waters (including boundary waters) of such States.

B. RELEVANT PROVISIONS OF THE FEDERAL POWER ACT

1. Section 4(e) of the Federal Power Act, as codified at 16 U.S.C. § 797(e), provides:

§ 797. General Powers of Commission

The Commission is authorized and empowered—

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project

works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts

and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

2. Section 10(a)(1) of the Federal Power Act, as codified at 16 U.S.C. § 803(a)(1), provides:

§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of

fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title² if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

3. Section 10(j) of the Federal Power Act, as codified at 16 U.S.C. § 803(j), provides:

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If,

² So in original. Probably should be followed by “; and”.

after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

4. Section 15(a)(2)-(3) of the Federal Power Act, as codified at 16 U.S.C. § 808(a)(2)-(3), provides:

§ 808. New licenses and renewals

(a) Relicensing procedures; terms and conditions; issuance to applicant with proposal best adapted to serve public interest; factors considered

(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project. In making a determination under this section (whether or not more than one application is submitted for the project), the Commission shall, in addition to the requirements of section 803 of this title, consider (and explain such consideration in writing) each of the following:

(A) The plans and abilities of the applicant to comply with (i) the articles, terms, and conditions of any license issued to it and (ii) other applicable provisions of this subchapter.

(B) The plans of the applicant to manage, operate, and maintain the project safely.

(C) The plans and abilities of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service.

(D) The need of the applicant over the short and long term for the electricity generated by the project or projects to serve its customers, including, among other relevant considerations, the reasonable costs and reasonable availability of alternative sources of power, taking into consideration conservation and other relevant factors and taking into consideration the effect on the provider (including its customers) of the alternative source of power, the effect on the applicant's operating and load characteristics, the effect on communities served or to be served by the project, and in the case of an applicant using power for the applicant's own industrial facility and related operations, the effect on the operation and efficiency of such facility or related operations, its workers, and the related community. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.

(E) The existing and planned transmission services of the applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.

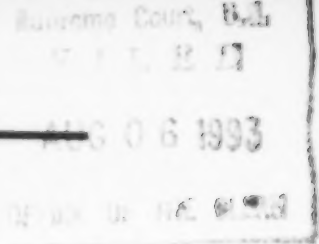
(F) Whether the plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner.

(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife resources affected by the development, operation, and management of the project shall be determined in accordance with section 803 of this title, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.

(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:

(A) The existing licensee's record of compliance with the terms and conditions of the existing license.

(B) The actions taken by the existing licensee related to the project which affect the public.



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OCTOBER TERM, 1993

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Petition for a Writ of Certiorari to the
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I. QUESTION PRESENTED

Whether the Washington Department of Ecology exceeded its legal authority when it imposed a condition in a water quality certification requiring a minimum instream flow to preserve and protect salmon and Steelhead trout in the Dosewallips River?

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Petition for a Writ of Certiorari to the
Supreme Court of the State of Washington

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

This case involves a challenge to a condition in a water quality certificate issued by the Washington Department of Ecology (Ecology). The condition requires the City of Tacoma and PUD No. 1 of Jefferson County (Petitioners) to maintain a specified minimum instream flow during operation of a proposed hydroelectric project. The minimum instream flow is necessary to preserve

salmon and other fish in the affected portion of the Dosewallips River.

II. STATEMENT OF THE CASE

A. Regulatory Framework.

1. *The Washington State Water Pollution Control Act, Wash. Rev. Code (RCW) Ch. 90.48 (1992)*. Chapter 90.48 RCW is Washington's primary water quality statute. RCW 90.48.035 authorizes Ecology to promulgate regulations to implement the statute, including "standards of quality for waters of the state." RCW 90.48.260 authorizes Ecology to implement state authority under the Federal Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.* (1988), including the establishment of water quality standards. RCW 90.48.260(1)(b).

Pursuant to RCW 90.48.035 and .260, Ecology first promulgated state water quality standards in 1973. Wash. Admin. Code (WAC) Chapter 173-201 (1990).¹ The water quality standards, which are an integral part of Washington's water quality protection program, do a number of things. First, general requirements are established, including antidegradation requirements. WAC 173-201-035. Second, the standards establish a water classification system ranging from Class AA (extraordinary) to Class C (fair). For each class a range of characteristic uses is defined. WAC 173-201-045 and -080. Then, numeric and narrative water quality

¹ The water quality standards which apply to this case are reproduced in Appendix L. The water quality standards were recodified as ch. 173-201A WAC in 1992.

criteria are set for each of these classes.² Finally, the standards address toxic substances. WAC 173-201-047.

The water quality standards classify the Dosewallips River as Class AA (extraordinary). WAC 173-201-080(32). The characteristic uses of Class AA waters include salmonid and other fish "migration, rearing, spawning" and "wildlife habitat." WAC 173-201-045(1)(b). Finally, WAC 173-201-035(8) reads, in part, as follows:

The antidegradation policy of the state of Washington, as generally guided by chapter 90.48 RCW, Water Pollution Control Act, and chapter 90.54 RCW, Water Resources Act of 1971, is stated as follows:

(A) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

....

(F) In no case will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term harm to the environment.

2. *The Water Resources Act of 1971, Ch. 90.54 RCW (1992)*. Chapter 90.54 RCW authorizes Ecology to manage the state's water resources according to certain principles. RCW 90.54.020(3)(a) authorizes Ecology to set

² Other than toxic substances addressed at WAC 173-201-047, the standards include numeric criteria for six water chemistry parameters. These are: 1) fecal coliform organisms; 2) dissolved oxygen; 3) total dissolved gas; 4) temperature; 5) pH; and 6) turbidity. WAC 173-201-045(1)(c).

minimum instream flows to protect certain instream values. RCW 90.54.020(3)(a) reads as follows:

Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

3. *The Clean Water Act, 33 U.S.C. § 1251, et seq. (1988)*. The CWA was enacted with the purpose of protecting the "physical, chemical and biological integrity" of the Nation's waters. 33 U.S.C. § 1251(a). To achieve this purpose, the CWA utilizes a combination of "end of pipe" pollution control measures, e.g., effluent limits under § 301, 33 U.S.C. § 1311, and receiving water standards, e.g., water quality standards under § 303, 33 U.S.C. § 1313.

Section 401 of the CWA authorizes the states to issue a water quality certificate for any project or activity which 1) will require a federal permit; and 2) may result in a discharge to navigable waters. However, the certificate may only be issued if the project or activity will comply with certain provisions of the CWA, including §§ 301 and 303. 33 U.S.C. § 1341(a). Section 401(d) authorizes the states to impose conditions in a certificate to ensure compliance with certain provisions of the CWA and with "any other appropriate requirement of state law."³

³ Section 401 is reproduced in full in Appendix M, pp. 123a-128a.

Prior to the enactment of § 401 in 1972, states were limited to ensuring that projects subject to the water quality certificate requirement would comply with state water quality standards.⁴ That authority was expanded by § 401, which authorizes states to ensure compliance with water quality standards, with several other requirements of the CWA, and, as mentioned above, with "any other appropriate requirement of state law."

4. *The Federal Power Act (FPA), 16 U.S.C. §§ 791-828*. The FPA was first enacted in 1920. The purpose of the FPA was to create a federal regulatory scheme for certain power-producing facilities, including hydroelectric projects. In 1946 this Court decided *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946). In *First Iowa* this Court ruled that the FPA preempts state law when a conflict or potential conflict exists between the federal statute and state law. *California v. FERC*, 495 U.S. 490 (1990), affirmed *First Iowa's* holding that the

⁴ Section 21(b) of the Water Quality Improvement Act of 1970, which was § 401's predecessor, reads, in pertinent part, as follows:

b.(1) Any applicant for a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the state in which the discharge originates . . . that there is reasonable assurance, as determined by the state . . . that such activity will be conducted in a manner which will not violate applicable water quality standards. . . .

FPA preempts state law where there is a conflict between the federal statute and state law.⁵

Congress created an explicit exception to the FPA's comprehensive regulatory scheme when it enacted § 401 of the CWA, which authorizes states to issue, deny, or condition water quality certificates for certain federally licensed projects, including hydroelectric projects licensed by the Federal Energy Regulatory Commission (FERC).⁶

B. The Dosewallips River And The Proposed Elkhorn Hydroelectric Project.

The Dosewallips River originates in the glaciers of the eastern Olympic Mountains and flows east to Hood Canal in western Puget Sound. Currently, the river is largely undisturbed by human activity and is being studied for possible inclusion on the National Wild and Scenic Rivers list. Approximately one-half of the Dosewallips River is located in Olympic National Park, and the proposed Elkhorn diversion dam is to be sited just outside the park boundary. At the dam, most of the river's water will be diverted out of the river and into a large pipe (penstock). The water will be returned to the river 1.2

⁵ Cf. *Soyles Hydro Ass'n v. State Water Resource Control Bd.*, 985 F.2d 451 (9th Cir. 1993) (holding that the FPA occupies the field with regard to hydropower licensing).

⁶ Legislative history explains that Congress was well aware of § 401's impact on the FPA's licensing scheme:

Should [a § 401 certificate] . . . denial occur no license or permit could be issued by such federal agencies as the Atomic Energy Commission, Federal Power Commission [now FERC], or the Corps of Engineers unless the state action was overturned in the appropriate courts of jurisdiction.

(Emphasis added.) S. Rep. No. 414, 92d Cong., 2d Sess. 69 (1972), reprinted in 1972 U.S.C.C.A.N. 3735.

miles downstream. Thus, the mostly de-watered "bypass reach" will be approximately 1.2 miles in length.

The river supports populations of salmon, Steelhead trout (Steelhead), and resident trout which have thrived historically but are now severely depleted. The decline of the fishery resource in the Dosewallips is emblematic of the decline of salmon and Steelhead in the Northwest.⁷ These fish are tremendously important, both economically and culturally, to the Northwest.⁸ The minimum instream flow required by the state may not stop the decline of this resource, but the evidence presented at trial is clear that without it, one section of the Dosewallips River will be lost as habitat for salmon and Steelhead.

C. Proceedings Below.

In 1982 Petitioners applied to FERC for a major hydroelectric license for the proposed Elkhorn project. From 1982-85 fishery experts from the Washington Departments of Ecology, Fisheries and Wildlife, the U.S. Fish & Wildlife Service, the National Marine Fisheries Service, and the Point No Point Treaty Council (a consortium of Indian tribes which have historically fished in the Dosewallips River and Hood Canal) worked with the Petitioners on a complex study of the bypass reach. The study was conducted to determine the minimum amount of river flow necessary to protect and preserve salmon and

⁷ In a seminal study entitled *Pacific Salmon at the Crossroads*, the Endangered Species Committee of the American Fisheries Society identifies 214 Pacific salmon stocks that face a risk of extinction or are of special concern. The study notes that the Spring Chinook salmon run in the Dosewallips is at or near extinction. W. Nehlsen, et al., *Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho and Washington*, 16 Fisheries, No. 2 (March-April 1991).

⁸ See Salmon and Steelhead Conservation and Enhancement Act of 1980, Pub. L. No. 96-561, § 102, 94 Stat. 3275 (1980).

Steelhead in the bypass reach. At the conclusion of the study, all parties attempted to reach agreement with regard to the necessary instream flow. In October 1985, the agency experts set an instream flow which they believe is the minimum necessary to preserve and protect the bypass reach as viable habitat for salmon and Steelhead.⁹

On June 11, 1986, Ecology issued a water quality certificate (hereinafter referred to as § 401 certificate) for the Elkhorn project. The certificate includes a condition requiring the minimum flow set by the agencies.¹⁰

On July 14, 1986, Tacoma appealed the § 401 certificate to the Pollution Control Hearings Board (PCHB). On two different cross motions for summary judgment, the PCHB ruled that the minimum flow condition is appropriate under state and federal law. The primary basis for the PCHB's ruling was the "other appropriate requirement of state law" provision of § 401(d) of the CWA. The PCHB held that this provision authorizes Ecology to impose conditions necessary to ensure compliance with state laws that are related to water

⁹ Petitioners have proposed three different minimum flows. Exhibit R-3, which was submitted at trial (App. 86a) reflects the agencies' minimum flow and Petitioners' first two proposals. Petitioners revised their proposal a third time at trial.

¹⁰ Petitioners make much of a statement in the certification that the flows are in excess of those required to maintain water quality in the bypass reach, but are included for purposes of protecting the fishery resource. That statement was clarified, however, by an affidavit of its author, Mr. Walter Bergstrom, which was submitted to the Pollution Control Hearings Board (PCHB) in support of Ecology's Motion for Summary Judgment before the PCHB. The affidavit explains that the term "water quality" as used in the statement in question refers to water temperature only. Thus, as the affidavit states, the phrase "while these flows are in excess of those required to maintain water quality" means that the flows are in excess of those required to meet Washington's water quality standard for temperature. (WAC 173-201-045(1)(c)(iv).) (App. 100a.)

quality. The PCHB reasoned that the minimum flow is necessary to ensure compliance with RCW 90.54.020(3)(a); that this state statute is an appropriate requirement of state law under § 401(d) because it is related to water quality; and, therefore, that the minimum flow condition is within the scope of authority granted to Ecology under § 401(d). The PCHB also rejected Petitioners' argument that the FPA preempts the minimum flow condition. (App. 71a.)

On February 24, 1989, the state and Petitioners appealed the PCHB's decision to Thurston County Superior Court. The superior court affirmed the PCHB's ruling that the minimum flow condition is authorized by § 401(d) of the CWA and that the minimum flow condition is not preempted by the FPA. (App. 42a.)

Petitioners appealed the superior court judgment to the Washington Supreme Court. The Washington Supreme Court issued its unanimous decision on April 1, 1993. The supreme court affirmed the superior court's judgment, ruling that the minimum flow condition is appropriate under § 401(d) and that the minimum flow condition is not preempted by the FPA. (App. 28a.)

III. REASONS FOR DENYING THE PETITION

The decision below consists of three rulings. The first is that the minimum flow is necessary to ensure compliance with state water quality standards. The second is that the minimum flow is necessary to ensure compliance with "other appropriate requirement[s] of state law," under § 401(d), specifically RCW 90.54.020(3)(a). The third is that the minimum flow condition is not preempted by the FPA.¹¹ The remainder of this brief addresses each of

¹¹ Petitioners have modified the preemption argument they made below. Now Petitioners argue that the decision below fails to properly harmonize the CWA and the FPA.

these issues and will explain that review by this Court is unnecessary and inappropriate. To begin with, the water quality standards basis for the decision below raises no federal issue and is based on adequate and independent state grounds. Second, the decision below properly interprets § 401(d)'s "other appropriate requirement of state law" provision. Third, the decision below properly harmonizes the CWA and the FPA.

A. The "Water Quality Standards" Basis For The Washington Supreme Court's Decision Raises No Issue Of Federal Law And Is Based On Adequate And Independent State Grounds.

1. The Decision Below. Petitioners argue that this case raises important questions regarding the proper interpretation of the CWA and the FPA, and the interplay between these two federal statutes. Petitioners also contend there is a difference of opinion among state courts regarding these important federal questions. In fact, however, state water quality standards provide the primary basis for the Washington Supreme Court's decision, and Petitioners concede that these state law standards are an appropriate basis for conditioning a § 401 certificate.

The Washington Supreme Court's judgment is based, first and foremost, on its determination that the minimum flow is necessary to ensure compliance with state water quality standards. A unanimous court stated its ruling as follows:

The parties agree that state water quality standards qualify as appropriate requirements of state law for purposes of section 401(d), and so may serve as the source for conditions imposed in the section 401 certificate. Ecology contends that the stream flow conditions in the 401 certificate issued to Tacoma were necessary to assure

compliance with Washington's water quality standards. We agree.

...
In short, section 401 requires states to certify compliance with state water quality standards. Washington's standards prohibit the degradation of the state's waters, and prohibit the degradation of fish habitat and spawning in the Dosewallips in particular. Therefore, section 401 required Ecology to certify that the Elkhorn project would not degrade fish habitat and spawning in the Dosewallips. Given that Ecology's fisheries biologists determined that the instream flows urged by Tacoma risked such degradation, Ecology therefore could not issue the 401 certificate without imposing more protective instream flow conditions. Absent such a condition, Ecology could not assure compliance with state water quality standards.

(App. 7a-8a.) (Emphasis added.)

2. Petitioners Concede That Water Quality Standards Are An Appropriate Basis For Conditioning A § 401 Certificate. As the court below notes, Petitioners acknowledge that water quality standards are an appropriate basis for conditioning a § 401 certificate. (App. 7a.) Indeed, Petitioners have consistently argued from the outset of this case that water quality standards are the *only* legitimate basis for such a condition. Significantly, Petitioners continue to make this concession before this Court. For example, on page 15 of the Petition for Writ of Certiorari, Petitioners state: "Congress, however, confined states' certificate authority to *water quality standards* and other limitations regulating the discharge of

pollutants expressly enumerated in § 401." (Emphasis added.)

3. *All Relevant State Court Decisions Agree That Water Quality Standards Are An Appropriate Basis For Conditions In A § 401 Certificate.* Not only do Petitioners take the position that water quality standards are an appropriate basis for conditioning a § 401 certificate, but every court which has addressed the issue also reaches this conclusion. In *Georgia Pacific Corp. v. Department of Envtl. Conservation*, 35 Env't Rep. Cas. (BNA) 2052 (Vt. 1992), petition for certiorari pending, No. 92-1012, *sub nom. Simpson Paper (Vermont) v. Department of Envtl. Conservation*, the Vermont Supreme Court upheld a minimum flow condition in a § 401 certificate. The primary basis for the court's ruling was its finding that the minimum flow was necessary to ensure compliance with the state's water quality standards.¹² See *Bangor Hydro-Electric Co. v. Board of Envtl. Protection*, 595 A.2d 438 (Me. 1991) (holding that state may deny § 401 certificate based on lack of compliance with state water quality standards); *Hi-Line Sportsmen Club v. Milk River Irrig. Dist.*, 786 P.2d 13 (Mont. 1990) (overturning state issuance of § 401 certificate based on lack of evidence that conditions imposed by the state would ensure compliance with water quality standards and other state water quality laws); *City of Klamath Falls v. Environmental Quality Comm'n*, 851 P.2d 602 (Or. App. 1993) (affirming state's

¹² This Court requested the views of the United States on the pending Petition for Writ of Certiorari in the *Georgia Pacific* case. ___ U.S. ___, 122 L. Ed. 2d ___, 113 S. Ct. 1410 (1993). The Solicitor General presented the United States' view that certiorari would not be appropriate because the primary basis for the Vermont Supreme Court's decision was that the minimum flow condition was necessary to ensure compliance with state water quality standards. The Solicitor General recognized that this constituted an adequate and independent state ground for the decision, which was not appropriate for review by this Court.

denial of § 401 certificate based on proposed hydroelectric project's noncompliance with state water quality standards); and *Arnold Irrig. Dist. v. Department of Envtl. Quality*, 717 P.2d 1274 (Or. App. 1986) (holding that states may enforce all state water quality-related laws, including water quality standards).

Even the New York cases, upon which Petitioners rely so heavily, hold that water quality standards are an appropriate basis, albeit the only appropriate basis, for a condition in a water quality certificate. *de Rham v. Diamond*, 295 N.E.2d 763 (N.Y. 1973); *In re Power Auth. v. Williams*, 457 N.E.2d 726 (N.Y. 1983); *Niagara Mohawk Power Corp. v. DEC*, 592 N.Y.S.2d 141 (1993); *Long Lake Energy Corp. v. DEC*, 563 N.Y.S.2d 871 (1990); and *Fourth Branch Assocs. v. DEC*, 550 N.Y.S.2d 769 (1989).¹³

In summary, every court which has addressed the issue agrees with the court below (and with the Petitioners) that state water quality standards are an appropriate basis for conditioning a § 401 certificate, i.e., such conditions are within the scope of authority provided to states by § 401 and are not preempted by the FPA.

4. *The Water Quality Standards Basis For The Decision Below Raises No Issue Of Federal Law.* The full scope of authority provided to states by § 401 is an issue of federal law, requiring, as it does, interpretation of the CWA. It is uncontested, however, that § 401 authorizes states to impose conditions necessary to ensure compliance

¹³ Supreme Court Rule 10 provides considerations governing review of Petitions for Writ of Certiorari. Petitioners argue that review is appropriate in this case under Rule 10.1.(b) because there are conflicting state court decisions on the issues presented. As explained above, there are no conflicting state court decisions with regard to the water quality standards basis for the decision below.

with state water quality standards. Petitioners concede this point, and every court which has addressed the issue reaches this conclusion. Simply put, it is well settled that § 401 authorizes states to impose conditions based on water quality standards. Thus, the federal question regarding water quality standards has been answered, and Petitioners do not challenge that answer before this Court.

5. The "Water Quality Standards" Basis For The Decision Below Constitutes An Adequate And Independent State Ground. The only issue raised by Petitioners with regard to the water quality standards basis for the decision below involves the substantive requirements of the standards themselves. Obviously, what the standards require for the Dosewallips River is a question of state law. The state supreme court ruled that the state's water quality standards require Ecology to ensure that the proposed Elkhorn hydroelectric project will not degrade fish habitat, migration, and spawning in the Dosewallips River. This Court should defer to the rulings of Washington's highest court on questions of Washington State law. *See Michigan v. Long*, 463 U.S. 1032 (1983); *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Herb v. Pitcairn*, 324 U.S. 117 (1945).

In conclusion, the water quality standards basis for the decision below is inappropriate for review by this Court. This is so because it raises no contested issue of federal law, and the basis for the decision is state law. As such, the decision below is based on adequate and independent state grounds which should not be reviewed by this Court.

B. The State Water Quality Standards Require The Preservation And Maintenance Of Designated "Characteristic Uses" Such As Fish Habitat, Migration, And Spawning.

1. The Water Quality Standards. Petitioners argue that only the "criteria" portion of the state's water quality standards are enforceable and that all of the other provisions contained in the standards, including the characteristic uses and the antidegradation requirements, are not. In making this argument, and in an attempt to federalize the issue, Petitioners rely solely on the CWA and certain of its implementing regulations, while neglecting to cite, quote from, or even mention the terms of the state's water quality standards. This is not surprising, given the clarity with which the state's standards contradict Petitioners' argument.

As explained above, Washington's water quality standards classify the Dosewallips River as Class AA (extraordinary) and identify salmon and other fish migration, rearing, and spawning as characteristic uses of the river. WAC 173-201-080(32) and -045(1)(b). WAC 173-201-035(8)(a), one of the antidegradation requirements contained in the standards, reads as follows:

Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

These sections of Washington's water quality standards, especially the antidegradation requirements, make one thing absolutely clear -- no degradation of the state's waters is to be allowed which will interfere with or eliminate a characteristic use. The standards identify salmon and Steelhead migration, rearing, spawning, and harvesting as characteristic uses of the Dosewallips River. Thus, as the Washington Supreme Court ruled, the state is *required* to ensure that the Elkhorn project will not "interfere with or become injurious to" usage of the Dosewallips by salmon and Steelhead. (App. 7a.) _____

The minimum flow condition required by the state is designed to accomplish exactly that. Only with the state's minimum flow, which was set after three years of study by expert fisheries biologists, will salmon and Steelhead usage of the Dosewallips River be adequately protected.

2. *The CWA And EPA's Implementing Regulations Support The Washington Supreme Court's Reading Of The State Water Quality Standards.* Rather than address the state's water quality standards, Petitioners rely on the CWA and EPA's implementing regulations in arguing that only the criteria portion of the state water quality standards are enforceable. As just explained, Petitioners' argument is flatly contradicted by the terms of the state's water quality standards. Likewise, the CWA and EPA's regulations also directly contravene Petitioners' argument.

Indeed, the very section of the CWA cited by Petitioners supports the state's position. Section 303(2)(a) of the CWA states that water quality standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." Rather than supporting Petitioners, § 303(c)(2)(a) supports the decision below by expressly defining the water quality standards to include both the designated uses and the criteria. This section goes on to read "such standards shall be such as to protect the public health or welfare, enhance the quality of water and *serve the purposes of this chapter.*" (Emphasis added.) The purpose of the CWA is set forth, in part, in § 101(a), 33 U.S.C. § 1251(a), which states:

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

Section 303(c)(2)(a) and § 101 of the CWA make it abundantly clear that Congress was concerned with more than the chemical quality of the Nation's waters. Rather, the CWA was enacted to ensure that existing characteristic uses are protected and that the full integrity of the Nation's waters, including chemical, physical, and biological integrity, be maintained. In short, Petitioners' proposed interpretation of Washington's water quality standards is entirely inconsistent with the terms and the purpose of the CWA.

Likewise, there is no conflict between EPA's water quality standards regulations and the decision below. Again, the very regulation cited by Petitioners supports the state in this case. 40 C.F.R. § 131.2 (1992) reads, in part, as follows:

States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). "Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife

40 C.F.R. § 131.4 explains that states are responsible for establishing water quality standards and that states may adopt standards more stringent than required by EPA's regulations. 40 C.F.R. § 131.10(a) states that "[e]ach state must specify appropriate water uses to be achieved and protected." Finally, and most importantly, 40 C.F.R. § 131.12 requires that each state adopt a statewide antidegradation policy and identify the methods for

implementing such policy.¹⁴ 40 C.F.R. § 131.12(a)(1) reads as follows:

The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

Thus, Washington's antidegradation requirements, which require the protection of existing uses, are not only consistent with, but are required by, EPA's regulations.¹⁵

Quite simply, Washington's water quality standards are entirely consistent with the terms of the CWA and EPA's implementing regulations. The state's standards, like the federal standards, do not limit the state to scrutinizing the chemical quality of the state's waters while blindly ignoring the fact that characteristic uses are threatened or eliminated. To the contrary, the state and federal standards require that characteristic uses be protected and maintained.¹⁶

¹⁴ In 1987 Congress ratified EPA's antidegradation requirements when it enacted § 303(d)(4)(B), which incorporates the antidegradation standard. 33 U.S.C. § 1313(d)(4)(B). See *Columbus and Franklin County v. Shank*, 600 N.E.2d 1042, 1054 (Ohio 1992).

¹⁵ EPA approved Washington water quality standards on October 28, 1977. 42 Fed. Reg. 56786 (1977).

¹⁶ Judicial interpretations of water quality standards similar to Washington's support the decision below. In *Bangor*, 595 A.2d 438, the Maine Supreme Court was faced with Petitioners' argument here, i.e., that only the criteria portion of the water quality standards are enforceable and that designated uses are not. The Maine Supreme Court rejected this argument, stating: "[w]e cannot conclude that the designated uses included in section 465 are mere surplusage" and that designated uses "are an integral part of the state

The Petitioners' argument is an extreme example of form over substance. They argue that the state is required to ignore the Elkhorn project's adverse impact or even elimination of salmon and Steelhead in the affected portion of the river, as long as certain chemical parameters are met. What is the point of maintaining the Dosewallips River at 16° celsius and a pH of 6.5-8.5, when there is insufficient water in the river for fish? The lack of merit in Petitioners' position is self-evident.

C. The Decision Below Properly Interprets § 401(d) Of The CWA And Properly Harmonizes The CWA And The FPA.

As explained above, the water quality standards are one of the three bases for the decision below. We have just explained that the water quality standards are an adequate and independent state ground for that decision. We will now address the other two bases for the decision below. The first is the lower court's ruling that the minimum flow condition is appropriate because it is necessary to ensure compliance with an "other appropriate requirement of state law" under § 401(d). The second is the lower court's ruling that the FPA does not preempt the minimum flow requirement. As mentioned previously, Petitioners no longer argue that the FPA preempts the minimum flow condition. Rather, they argue that the decision below fails to properly interpret the interplay between the FPA and the CWA and is inconsistent with FERC's licensing authority under the FPA. As explained

water quality standards." *Id.* at 442-43. See also *In re Issuance of Permit*, 576 A.2d 784 (N.J. 1990) ("It is self-evident that the purpose of the antidegradation policy is to protect existing water uses and to maintain present water quality. No irreversible changes may be made to existing water quality that would impair or preclude attainment of the designated uses of the waterway." *Id.* at 791; *Columbus and Franklin County*, 600 N.E.2d 1042; *Hi-Line Sportsmen*, 786 P.2d 13.

below, neither of these rulings raise substantial federal questions appropriate for review by this Court.

1. The Decision Below Properly Interprets § 401(d)'s "Any Other Appropriate Requirement of State Law" Provision. Petitioners argue that the "other appropriate requirement of state law" provision of § 401(d) only authorizes states to ensure compliance with state water quality standards. This is a relatively difficult argument to make since § 401(d) does not mention water quality standards at all. Nevertheless, we agree that water quality standards are one appropriate basis for a condition in a § 401 certificate. There is simply no authority in the CWA, however, for the proposition that water quality standards are the only legitimate basis for such a condition.

The court below ruled as follows:

We hold that the streamflow conditions Ecology included in the 401 certificate it issued to Tacoma were an appropriate measure to assure compliance with Washington's water quality standards. We also hold that a section 401 water quality certificate may include conditions to enforce all state water quality-related statutes and rules, including but not limited to, state water quality standards.

(App. 13a.) This ruling gives proper effect to § 401(d) and is supported by all persuasive authority addressing this issue.

a) The terms of § 401(d). First, and most important, the decision below is consistent with the terms of § 401(d). The fatal flaw in Petitioners' argument is that it fails to give any effect to the "other appropriate requirement of state law" provision of the statute. It is

axiomatic that congressional enactments are to be interpreted such that every word, clause, and sentence of a statute is given effect. *United States v. Nordic Village, Inc.*, 503 U.S. ___, 112 S. Ct. 1011 (1992); *United States v. Gooding*, 25 U.S. 460 (1827).

The Court below relied on § 101(a), the purpose section of the CWA, for guidance in interpreting § 401(d). This is most appropriate. *Crandon v. United States*, 494 U.S. 152, 158 (1990). Section 101(a)'s reference to "physical, chemical and biological integrity" is compelling evidence of Congress's concern with ecosystems and the overall health of the Nation's waterways and its rejection of the hopelessly limited approach suggested by Petitioners.¹⁷

b) Legislative history of § 401(d). The legislative history of § 401(d) also supports the decision below. As mentioned above, the predecessor to § 401 was § 21(b) of the Water Quality Improvement Act of 1970. Section 21(b) did not contain the "other appropriate requirement of state law" phrase contained in § 401(d) and expressly limited states to determining whether the discharge would violate water quality standards.

Section 401's legislative history explains that under its provisions states are not limited to considering water quality standards. Rather, states are required to ensure compliance with "any water quality requirements

¹⁷ Petitioners suggest that the decision below is inconsistent with the well-recognized rule of statutory construction referred to as *ejusdem generis*. Petitioners argue that § 401(d)'s references to sections of the CWA are limited to provisions of the statute which deal solely with discharges of pollutants. As explained above, water quality standards, which Petitioners admit are an appropriate basis for § 401 certificate conditions, deal with water uses and broad water quality concerns like biologic quality. The water quality standards are simply not limited to setting limits for discharges of pollutants. Thus, Petitioners' *ejusdem generis* argument is without merit.

established under state law." S. Rep. No. 414, 92d Cong., 2d Sess. 69 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3735. Obviously, this refers to more than just water quality standards. Moreover, the senate conference report recognizes that § 401(d) "expanded" state authority over that which was provided by the Water Quality Improvement Act. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 138 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3815. Thus, the legislative history supports the ruling below that § 401(d) allows states to ensure compliance with water quality standards and with other water quality-related requirements.¹⁸

c) *Judicial interpretation of § 401(d)*. The decision below is also consistent with most of the state court cases interpreting § 401. Many of these cases have been discussed above; we simply note here that the more thoughtful state court decisions addressing this issue have concluded that states may require compliance with state water quality laws, including, but not limited to, water quality standards, in conditioning a § 401 certificate. See *Arnold Irrig. Dist.*, 717 P.2d at 1279 (§ 401 allows "the states to enforce all water quality-related statutes and rules through the state's authority to place limitations on section [401] certificates"); *Hi-Line Sportsmen*, 786 P.2d at 16

¹⁸ The decision below is also consistent with EPA's interpretation of § 401. Attached as Appendix K, pp. 90a-93a, is a letter dated January 18, 1991, from Ms. LaJuana S. Wilcher, an assistant administrator with EPA to the Honorable Lois D. Cashell with FERC. The letter states that it was written on behalf of EPA's Office of Water Enforcement and Permits "to help clarify issues regarding the application of Clean Water Act § 401 state water quality certification to Federal Energy Regulatory Commission (FERC) licenses." This letter explains that "protection of water quality involves far more than just addressing water chemistry." The letter fully supports the minimum flow condition at issue. As the agency that administers the CWA, EPA's interpretation of the statute's provisions are entitled to deference by this Court. *Chevron, USA v. NRDC*, 467 U.S. 837, 844 (1984).

(overturning state issuance of § 401 certificate based on insufficient evidence that conditions in the certification would ensure compliance with "applicable water quality standards, the non-degradation requirements of the Water Quality Act and the public policy of the state to protect fish and wildlife").

The only cases which support Petitioners are a line of New York cases starting with *de Rham v. Diamond*, *supra*. In *de Rham*, the New York Court of Appeals held that only water quality standards could be considered in issuing or denying a § 401 certificate. This reasoning has been followed in a long line of New York cases. The *de Rham* decision is hardly surprising considering that the *de Rham* court was interpreting § 21(b) of the Water Quality Improvement Act of 1970. As explained, that provision expressly limited a state to assuring compliance with state water quality standards. Thus, the *de Rham* decision was appropriate given the statutory provision it was interpreting.

The courts following *de Rham* have failed to recognize that § 401 replaced § 21(b) in 1972 and considerably expanded state authority. Most importantly, the New York courts have failed to recognize the addition of the "other appropriate requirement of state law" provision in 1972. In short, the New York cases, which limit a state to considering water quality standards in conditioning a § 401 certificate, are incorrectly decided.

In conclusion, the decision below properly interprets the "other appropriate requirement of state law" provision of § 401(d). The Washington Supreme Court's conclusions are mandated by the terms of § 401(d) and its legislative history, and is supported by the more persuasive judicial interpretations of the statute.

2. The Decision Below Is Consistent With The FPA's Licensing Scheme. The Petitioners argue that the decision below undermines the regulatory framework set forth in the FPA for hydroelectric projects,¹⁹ and will eliminate the balancing of interests that FERC engages in under the FPA. Nothing could be further from the truth.

Under the decision below, FERC will continue to implement the comprehensive system of regulation that Congress has crafted, and will certainly engage in the balancing of interests envisioned by the FPA when issuing licenses for hydroelectric projects. The decision simply recognizes the fact that Congress has authorized states to regulate the water quality impacts of hydroelectric projects.²⁰ As the court below stated: "The comprehensive scheme consisting of both the Clean Water Act and the FPA presupposes rather than precludes the exercise of state authority." (App. 19a.)

Petitioners argue that the decision below is inconsistent with this Court's ruling in *California v. FERC*, 495 U.S. 490 (1990). In the *California* case, the state issued a regulatory order to the operator of a hydroelectric

¹⁹ Petitioners argue that the FPA licensing scheme is comprehensive, if not exclusive, in nature. Hydroelectric projects, however, must comply with a number of regulatory schemes in addition to the one created by § 401 of the CWA. One example is the CWA's § 404 permit requirement administered by the Army Corps of Engineers. 33 U.S.C. § 1344. See *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir. 1987); another example is § 4(e) of the FPA itself which requires hydropower licensees to comply with requirements imposed by federal land management agencies. 16 U.S.C. § 797(c). See *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984).

²⁰ It is important to note that Congress expressly recognized that it was ceding authority over the water quality impacts of hydroelectric projects to the states when it enacted § 401. S. Rep. No. 414, 92d Cong., 2d Sess. 69 (1972), reprinted in 1972 U.S.C.C.A.N. 3735.

project requiring a minimum instream flow. The state order was issued pursuant to state law, not § 401. Moreover, the order was issued some four years after FERC issued an FPA license for the project. The flow required by the state directly conflicted with a minimum flow prescribed by FERC in the license. This conflict led to this Court's ruling that the state requirement was preempted by federal law.

California v. FERC is a very different case than the case at bar. Most importantly, *California v. FERC* did not involve § 401 of the CWA. Rather, the state in that case was acting pursuant to state law only. Furthermore, there was an actual conflict between state and federal requirements in that case. There is no such conflict in this case. In sum, *California v. FERC* has little to do with this case, and Petitioners' arguments to the contrary are without merit.

In summary, there is nothing in the decision below that undermines the FPA, the 1986 Amendments to the FPA,²¹ or the consultation process set forth in § 10(j) (16 U.S.C. § 803(j)) of the FPA. In fact, we agree with the Petitioners that state authority under § 401 is quite limited. Water quality is the only area Congress delegated to the states under § 401. In contrast to the state's limited decision-making authority under § 401, Congress has granted authority to FERC to address a huge range of issues raised by hydroelectric projects. It is FERC's role to consider issues ranging from power concerns to cost to socio-economic impacts. It is also FERC's role to

²¹ These amendments are referred to as the Electrical Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 ("ECPA"). The legislative history of ECPA expressly states that the amendments do not affect or amend "any environmental law." H.R. Rep. No. 507, 99th Cong., 2d Sess. 21 (1986), reprinted in 1986 U.S.C.C.A.N. 2508.

consider a project's environmental impacts. See 16 U.S.C. §§ 797(e) and 803(a). However, Congress has given to the states the responsibility to protect water quality. The § 401 certificate is the vehicle by which this responsibility is implemented. After the state sets minimum requirements to protect water quality in the § 401 certificate, it is FERC's responsibility to implement the FPA's mandate. In this manner, the intent of Congress in enacting the FPA and the CWA is achieved.

The Petitioners paint an alarming picture which they allege will result from the decision below. They argue that the minimum flow condition required by Ecology renders the Elkhorn project infeasible,²² and that the decision below opens the door to the state of Washington and other states to shut down hydroelectric projects.

With regard to the Elkhorn project, the state has repeatedly demonstrated a most reasonable approach to regulating the water quality impacts of the project. To begin with, Ecology and other state, federal, and tribal experts worked with Petitioners for three years in an attempt to reach a consensus on a minimum flow. Only when that attempt failed did Ecology issue the § 401 certificate requiring the minimum flow: a flow which the state determined necessary to protect dwindling stocks of salmon and Steelhead, and, just as importantly, to ensure the Elkhorn project's compliance with state law. Simply put, the minimum flow is based on credible scientific data and is required by clear and objective requirements of state water quality laws. Water quality requirements, like the minimum flow condition in this case, will not, as

²² Petitioners make a totally unsupported argument before this Court that the minimum flow required by Ecology renders the Elkhorn project economically infeasible. Petitioners have never produced any evidence to substantiate this allegation despite an opportunity to do so before the PCHB.

Petitioners argue, "destroy the effectiveness of the FPA." Rather, they will ensure that hydroelectric projects will not cause legally prohibited degradation of the Nation's waters.

It is probable that this Court will one day be presented with a case which requires it to define the limits of authority granted to states under § 401 of the CWA and to define the appropriate relationship between § 401 and the FPA. This, however, is not that case. The minimum flow required by the state is clearly related to water quality; in fact is required by the state's water quality standards. As such, the minimum flow condition is within the scope of § 401, and is completely consistent with the regulatory framework applicable to hydroelectric projects that Congress has enacted.

IV. CONCLUSION

For all of the foregoing reasons, the state of Washington urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDICES

1a

APPENDIX A

THE SUPREME COURT OF WASHINGTON

No. 58272-6

Thurston County No. 89-2-00413-2

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES and
DEPARTMENT OF WILDLIFE,
Respondents,

v.

PUD No. 1 of JEFFERSON COUNTY and
CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES,
Appellants.

MANDATE

THE STATE OF WASHINGTON TO: The Superior
Court of the State of Washington in and for Thurston County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 1, 1993, became the decision terminating review of this court in the above entitled cause on April 21, 1993. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: No cost bills having been timely filed, costs are deemed waived.

[SEAL]

2a

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 3rd day of May, 1993.

/s/ C. J. Merritt
C. J. MERRITT
Clerk of the Supreme Court,
State of Washington

3a

APPENDIX B

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

No. 58272-6

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES and
DEPARTMENT OF WILDLIFE,
Respondents,

v.

PUD No. 1 of JEFFERSON COUNTY and
CITY OF TACOMA, DEPARTMENT OF PUBLIC UTILITIES,
Appellants.

EN BANC

Filed Apr. 1, 1993

GUY, J.—This case arises as a result of plans of the City of Tacoma and the Jefferson County Public Utility District 1 (hereinafter Tacoma) to build a hydroelectric facility on the Dosewallips River. Federal law requires Tacoma to obtain a certificate from the Washington State Department of Ecology (Ecology) before beginning construction. Ecology granted the certificate but conditioned it upon Tacoma maintaining a certain minimum streamflow in the affected portion of the river. Tacoma argues that federal law preempts Ecology from setting this streamflow requirement, and that Ecology acted outside its authority because the requirement was designed to enhance the Dosewallips fishery rather than preserve it. We hold that there is no federal preemption and that setting the streamflow requirement was within Ecology's authority.

I

Facts

The Dosewallips River is a glacial stream that originates in the eastern Olympic Mountains. It flows east through the Olympic National Park, a national wilderness area, national forest land, and then private land before it empties into Hood Canal. The river is in pristine condition and supports populations of salmon, steelhead, and trout.

In 1982, Tacoma began planning to construct a hydroelectric power plant on the Dosewallips River just outside the Olympic National Park near the Elkhorn Campground. The "Elkhorn project", as it is called, will divert water from the river, use that water to run turbines to generate electricity, then return the water to the river 1.2 miles downstream. This will result in a reduction in the streamflow in the "bypass reach", which is the length of river between the initial diversion and where the water is returned downstream.

Federal law requires that Tacoma obtain a license from the Federal Energy Regulatory Commission (FERC) before beginning construction. In addition, section 401 of the federal Clean Water Act (Act), 33 U.S.C. § 1341, requires as a part of the licensing process that Tacoma obtain a water quality certificate from the State of Washington.

Tacoma applied to Ecology for the section 401 certificate in 1983. As part of the section 401 application process, Tacoma conducted a 2-year study of the effect of the Elkhorn project on fish habitat in the Dosewallips bypass reach. This study was performed in consultation with Ecology and other agencies, including the Washington State Departments of Fisheries and Wildlife, the United States Fish and Wildlife Service, the National Marine Fisheries Service, and the Point No Point Treaty

Council. At the conclusion of the study, Tacoma proposed to maintain minimum instream flows of between 65 cubic feet per second (cfs) and 155 cfs, depending on the month. Ecology eventually issued the section 401 certificate, but conditioned it upon Tacoma maintaining instream flows of between 100 cfs and 200 cfs.

Tacoma appealed Ecology's instream flows requirement to the Pollution Control Hearings Board (Board). The Board ruled that Ecology acted within its authority in placing base flow conditions within the section 401 certificate in order to preserve the Dosewallips fishery resource. The Board then held another hearing to consider Tacoma's argument that Ecology exceeded its authority because its flow regime for the Dosewallips was designed to enhance rather than merely preserve the fishery. Two of the three Board members agreed with Tacoma's argument and so reversed the flow rates set by Ecology. The third Board member dissented on the basis that Ecology's flow rates would not enhance the fishery.

The parties cross-appealed to the Thurston County Superior Court, which ruled that Ecology is not preempted from setting minimum streamflows, that the Board erred in finding Ecology's flows would enhance the Dosewallips fishery, and that in any case Ecology has the authority to require such an enhancement. The trial court therefore reinstated Ecology's streamflow rates. We granted Tacoma's motion for direct review.

II

Ecology's Authorization under the Clean Water Act

Tacoma argues that the Federal Power Act (FPA), 16 U.S.C. § 791a *et seq.*, preempts Ecology from conditioning a section 401 certificate upon the maintenance of a minimum streamflow. Ecology contends the preemption doctrine does not apply because it was acting

under the authority granted to it by the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

We begin by addressing whether the Clean Water Act authorized Ecology to include base flow requirements in the section 401 certificate it issued to Tacoma. We conclude that it did.

A

State Water Quality Standards

Section 401 of the Clean Water Act generally requires any applicant for a federal license to obtain a state water quality certificate if the applicant's operations may result in a discharge into a waterway. 33 U.S.C. § 1341. The parties agree that Tacoma was required to obtain a 401 certificate from Ecology. The controlling provision here of section 401 is subsection (d), which provides:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title [section 301 or 302 of the Act], standard of performance under section 1316 of this title [section 306 of the Act], or prohibition, effluent standard, or pretreatment standard under section 1317 of this title [section 307 of the Act], and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1341(d). Thus, under section 401(d), the state is required to include whatever conditions are "necessary to assure" compliance with specific provisions of the Act, as well as with "any other appropriate re-

quirement of State law". The parties agree that state water quality standards qualify as appropriate requirements of state law for purposes of section 401(d), and so may serve as the source for conditions imposed in the section 401 certificate. Ecology contends that the stream-flow conditions in the 401 certificate issued to Tacoma were necessary to assure compliance with Washington's water quality standards. We agree.

The stated purposes of Washington's water quality standards include the goal of establishing such standards as are "consistent with public health and public enjoyment thereof, and the *propagation and protection of fish, shellfish, and wildlife*". (Italics ours.) WAC 173-201-010. This purpose is consistent with the Environmental Protection Agency's (EPA) declaration that state water quality standards "should, wherever attainable, provide water quality for the protection and propagation of fish." 40 C.F.R. § 130.3 (1991). The standards define an antidegradation policy for the state's waters, as required under federal regulations. WAC 173-201-035(8) (implementing 40 C.F.R. § 131.12(a) (1991)). That policy includes the principle that "[e]xisting beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." WAC 173-201-035(8)(a). The Dosewallips River is specifically identified as a "Class AA" river. WAC 173-201-080(12). The characteristic uses of a Class AA river include "fish migration, rearing, spawning, and harvesting." WAC 173-201-045(1)(b)(iii).

In short, section 401 requires states to certify compliance with state water quality standards. Washington's standards prohibit the degradation of the state's waters, and prohibit the degradation of fish habitat and spawning in the Dosewallips in particular. Therefore, section 401 required Ecology to certify that the Elkhorn project would not degrade fish habitat and spawning in the Dose-

wallips. Given that Ecology's fisheries biologists determined that the instream flows urged by Tacoma risked such degradation, Ecology therefore could not issue the 401 certificate without imposing more protective instream flow conditions. Absent such a condition, Ecology could not assure compliance with state water quality standards.

We also note that the concept of pollution in the Clean Water Act is extremely broad. Section 502(19) of the Act, 33 U.S.C. § 1362(19), reads: "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." Under this broad definition, man-induced alteration of streamflow level is "pollution". We further note a letter written by an EPA assistant administrator to the Secretary of FERC. The letter takes issue with an assertion in a FERC report that conditions related to fish, wildlife, vegetation, and recreation are inappropriate in section 401 certificates needed to obtain licenses from FERC. The letter states:

[P]rotection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system. Relevant water quality issues include . . . the diversity and composition of the aquatic species . . . [and] habitat loss . . .

Brief of Respondent, at 94 (letter from LaJuana Wilcher, Assistant Administrator of the EPA, to the Honorable Lois D. Cashell, Secretary of FERC).

Finally, other states also have water quality standards that make reference to fish and wildlife concerns, and such concerns have been held properly to require instream flow conditions in section 401 certificates. For example, in *Bangor Hydro-Elec. Co. v. Board of Envtl. Protec.*,

595 A.2d 438 (Me. 1991), a section 401 certificate applicant argued that the Maine Board of Environmental Protection had exceeded its authority in asking for information about the project's effect upon fish habitat. The Maine Supreme Court rejected this argument and explained that under Maine's water quality standards, the "designated uses" of the affected river included fish habitat. The court stated that because these designated uses are an integral part of the state water quality standards, the Board's information request was proper. 595 A.2d at 443. Similarly, in *Hi-Line Sportsmen Club v. Milk River Irrig. Dists.*, 241 Mont. 182, 786 P.2d 13 (1990), the Montana Board of Health and Environmental Sciences issued a section 401 certificate for the construction and operation of a "siphon scheme" at a hydroelectric dam that would have raised the water temperature in the effected river. The court upheld the district court ruling that the record failed to show the project would not violate state water quality standards, which included provisions regarding the use of the river for fish habitat. 241 Mont. at 187-88. See also *Georgia-Pacific Corp. v. Vermont Dep't of Envtl. Conservation*, 35 Env't Rep. (BNA) 2046 (Vt. Super. Ct. Oct. 4, 1991), *aff'd*, 35 Env't Rep. (BNA) 2052 (Vt. Sup. Ct. Sept. 14, 1992) (water quality standards recognized as appropriately concerning aesthetics, recreation, and wildlife).

Tacoma argues that water quality standards are limited to pollution and discharges, as opposed to stream flow levels. It is true that the standards include provisions regarding pollution discharges. See e.g., WAC 173-201-045(1)(c)(vii) (criteria for concentrations of toxic, radioactive, and deleterious materials in Class AA waters). However, as explained above, the standards' explicitly-stated antidegradation policy and classification of specific bodies of water in terms of characteristic uses, as well as the standards' broad purpose, all demonstrate

a broad concern for water quality, not just with pollution discharges. *See Bangor Hydro-Elec. Co. v. Board of Env'tl. Protec., supra* (water quality standards would be a nullity if state could not consider designated uses).

B

Section 401's Integration of

"Any other Appropriate Requirement of State Law"

Ecology also maintains that the streamflow condition it imposed in Tacoma's section 401 certificate was an appropriate measure to carry out RCW 90.54.020(3)(a), which provides that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." Tacoma, joined by a group of utilities acting as amicus curiae, argues that the phrase "any other appropriate requirement of State law" refers only to state water quality standards. The Board ruled that the phrase refers to all state water quality-related statutes and rules, including, but not limited to, the water quality standards the state has adopted as required by section 303 of the Clean Water Act, 33 U.S.C. § 1313, and that Ecology's streamflow conditions were necessary to assure compliance with RCW 90.54.020(3)(a). We agree with the Board's interpretation.

We are required to interpret the words of a statute in accordance with their usual and ordinary meaning. *People's Org. for Wash. Energy Resources v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 825, 711 P.2d 319 (1985). The phrase "any other appropriate requirement of State law" contains no language to suggest its reference should be limited only to state water quality standards. Its meaning is not restricted to specific statutory or regulatory provisions, but only to those requirements of state law that are "appropriate".

The phrase's context within the Clean Water Act offers guidance as to its meaning. Most generally, Congress's broad purpose in enacting the Clean Water Act was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (a). This broad purpose suggests that what state laws qualify as "appropriate" for purposes of section 401(d) should also be understood broadly. In addition, section 401(d) expressly lists sections 301, 302, 306, and 307 of the Act as sources for the limitations in section 401 certificates. Thus, where Congress intended to refer to a specific provision, it did so. In contrast, section 303 (33 U.S.C. § 1313)—the section requiring states to adopt water quality standards—is *not* listed in section 401. If Congress intended to refer only to state water quality standards, it could have specifically referred to them. That Congress did not do so is evidence that it intended the phrase "any other appropriate requirement of State law" to refer broadly to all state water quality-related laws, not just to state water quality standards adopted pursuant to section 303.

The scope of "any other appropriate requirement of State law" was directly addressed in *Arnold Irrig. Dist. v. Department of Env'tl. Quality*, 79 Or. App. 136, 717 P.2d 1274, review denied 301 Or. 765 (1986). There, the Oregon Department of Environmental Quality had denied a request for a section 401 certificate on the ground that the applicants failed to provide a statement that the hydroelectric project was compatible with the country's comprehensive plan and land use ordinances. The applicants objected, saying that only water quality standards could be considered. The court rejected this on the basis explained above: if Congress had intended to make the section 303 standards the exclusive water quality criteria states may use in placing limitations in section 401 certificates, then Congress could have specifically mentioned those standards in section 401(d). 79 Or. App. at 142. The court therefore held that any

water quality related state law qualifies as an "appropriate requirement of State law" for purposes of section 401(d). 79 Or. App. at 142. *See also Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234 (S.D. Ala. 1976) (holding section 401(d) allows state to condition certification upon compliance with any requirement the state deems appropriate under state law). *But see Niagara Mohawk Power Corp. v. New York Dep't of Env'l Conservation*, — A.D.2d —, 992 N.Y.S.2d 141 (1993) (interpreting phrase within Clean Water Act in light of Congress's presumed intent in enacting FPA amendments).

The legislative history of section 401(d) further supports this interpretation. In particular, the differing treatment Congress gave sections 401(a) and 401(d) in a 1977 amendment is revealing. Generally, section 401(a) identifies specific provisions of the Clean Water Act and provides that noncompliance with any of those provisions enables a state to deny certification; section 401(d) confers authority on states to condition certification. As originally enacted in 1972 as part of the Federal Water Pollution Control Act Amendments (FWPCA), section 401(a) did not list section 303. Pub. L. No. 92-300, § 2, 86 Stat. 816, 877.79 (1972). Five years later, when Congress substantially supplemented the FWPCA by enacting the Clean Water Act, Congress amended section 401(a) to include reference to section 303. Pub. L. No. 95-217, § 64, 91 Stat. 1566, 1599 (1977). A Senate report submitted at the time explained that the purpose of the amendment was to follow the original congressional intent and to clarify that consideration of state water quality standards was part of the certification process under section 401(a). S. Rep. No. 370, 95th Cong., 1st Sess. 72-73, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4397-398. In so amending section 401(a), however, Congress failed to amend section 401(d) in the same way. As two commentators writing on this subject have explained,

[b]ecause of this omission, it seems clear that Congress did not mean to restrict conditions on certifications only to those necessary to assure compliance with section 303 water quality standards. Rather, Congress recognized a difference between the authority it provided in section 401(a)(1) to *deny* certification and that which it conferred in section 401(d) to *condition* certification. *It intended that the broader power contained in section 401(d) would allow the states to condition certification on compliance with state law provisions other than water quality standards adopted pursuant to section 303.*

(Some italics ours.) Ransel & Meyers, *State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant*, 7 Va. J. of Nat. Resources L. 339, 355 (1988).

We conclude that the phrase "any other appropriate requirement of State law" in section 401(d) does not refer only to state water quality standards. We agree with the *Arnold* court that the phrase is a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates. 79 Or. App. at 142.

We hold that the streamflow conditions Ecology included in the 401 certificate it issued to Tacoma were an appropriate measure to assure compliance with Washington's water quality standards. We also hold that a section 401 water quality certificate may include conditions to enforce all state water quality-related statutes and rules, including but not limited to, state water quality standards. Inasmuch as issues regarding water quality are not separable from issues regarding water quantity and base flow, we further hold that RCW 90.54.020(3) (a) qualifies as an "appropriate requirement of State law" for purposes of section 401(d), and therefore that Ecology's base flow limitation in the 401 certificate was

an appropriate measure to assure compliance with RCW 90.54.020(3)(a) as well as the water quality standards.

III

Federal Preemption

Having concluded that RCW 90.54.020(3)(a) and Washington's water quality standards authorize Ecology to impose streamflow conditions in section 401 certificates, we next consider Tacoma's contention that the FPA preempts Ecology's action. We reject Tacoma's preemption argument.

A.

The Threshold Requirement of State Action

The doctrine of federal preemption is based on the supremacy clause of the United States Constitution, U.S. Const., art. 6, cl. 2. Application of the doctrine presupposes as a threshold requirement some state action to be preempted by federal law. *See generally* L. Tribe, *American Constitutional Law* § 6-25 (2d ed. 1988). Here, several factors persuade us that Ecology's action in imposing a base flow condition in the 401 certificate lacks the character of state action required for federal preemption to apply.

First, a section 401 certificate is a federal permit required under the Clean Water Act, 33 U.S.C. § 1341, and in issuing this federal certificate, the state is required to set forth certain limitations. To the extent that the state's role is mandatory in these ways, the state cannot be said to be acting independently of the federal government.

Second, the sources of the streamflow limitation at issue here are state laws integrated into the Clean Water Act. In particular, Ecology's action was appropriate to assure compliance with RCW 90.54.020(3)(a) and Washington's water quality standards, which are inte-

grated into the Act as "appropriate requirement[s] of State law" under section 401(d).

Third, federal involvement in the development of state water quality standards is extensive. Those standards are required under the Clean Water Act, 33 U.S.C. § 1313. The Act requires states to devise the standards in accordance with federal regulations and to submit them to the EPA for approval. 33 U.S.C. § 1313. After the EPA approves the state's submitted standards, they become the water quality standards for the state. 33 U.S.C. § 1313(c)(3). Washington's water quality standards, in particular, have been duly adopted by the state and approved by the EPA. 50 Fed. Reg. 29,761 (1983) (noting EPA's approval of Washington's water quality standards). If a state fails to submit standards to the EPA, or if the standards it does submit are inconsistent with the Act, the EPA promulgates its own standards for the state. 33 U.S.C. § 1313(c)(4); *see also* 56 Fed. Reg. 58,477 (Nov. 19, 1991) (to be codified at 40 C.F.R. pt. 131) (proposed rulemaking by EPA to bring Washington's water quality standards into compliance with section 303(c)(2)(B) of the Act). This statutory framework gives water quality standards a hybrid character: they have the character of state laws insofar as the states initially promulgate them, but they have a federal character insofar as the EPA regulates their content and must formally approve them before they actually become the state's water quality standards. Indeed, in *Arkansas v. Oklahoma*, 503 U.S. —, 117 L. Ed. 2d 239, 257, 112 S. Ct. 1046 (1992), the Court declared that state water quality standards "are part of the federal law of water pollution control" at least insofar as they affect issuance of permits in other states. Similarly, the significant federal involvement in state water quality standards must be recognized when considering whether federal preemption applies to prevent a state from acting to assure compliance with them.

Finally, any conditions imposed in a 401 certificate become part of the federal license for which the certificate is required. Section 401(d) of the Act provides that any valid certification issued under section 401 "shall become a condition on any Federal license" for the activity in question. "FERC may not alter or reject conditions imposed by the states through section 401 certificates." *United States Dep't of the Interior v. Federal Energy Regulatory Comm'n*, 952 F.2d 538, 548 (D.C. Cir. 1992). FERC itself has recognized that the terms and conditions included in a section 401 certificate "become terms and conditions of the license as a matter of law." [Apr.-June 1990 Transfer Binder] 51 Fed. Energy Reg. Comm'n (CCH) ¶ 61,268 at 61,343. Thus, the condition at the heart of the present controversy—the condition within the 401 certificate Ecology issued to Tacoma—will be, as a matter of law, a term of whatever hydroelectric operating license FERC eventually issues to Tacoma; as such, the condition will be a part of federal law.

By including base flow limitations in the section 401 certificate it issued to Tacoma, Ecology was acting to fulfill its obligations under federal law. The section 401 certificate must assure compliance with state laws integrated into the Clean Water Act. In particular, the certificate must assure compliance with water quality standards, which are regulations the content of which was substantially determined by the EPA and which assumed the status of state water quality standards only after the EPA gave its approval. Finally, the streamflow condition, as part of the 401 certificate, also becomes a term of the FERC license by operation of law and as such a part of federal law. These factors collectively demonstrate such a significant and pervasive federal involvement that Ecology's action cannot be fairly regarded as state action for purposes of the application of federal preemption. Simply put, federal preemption doctrine does not apply in a context where a state is acting to fulfill its

federally mandated role in the comprehensive federal scheme embodied in the Clean Water Act.

B

Preemption Doctrine

Even if the threshold requirement of state action were met, the well-established principles regarding federal preemption would not support finding preemption in the present case.

As we recently observed in *Inlandboatmen's Union of the Pac. v. Department of Transp.*, 119 Wn.2d 697, 701, 836 P.2d 823 (1992), there are two well-established ways in which federal law may preempt state law: field preemption and conflict preemption. Field preemption may arise from either an explicit or an implicit expression of Congress's intent. Absent explicit preemptive language, Congress's intent to supersede state law may be implied if

- (1) a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, (2) if the federal act touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or (3) if the goals sought to be obtained or the obligations imposed reveal a purpose to preclude state authority.

Inlandboatmen's Union, at 701. Conflict preemption may arise either when compliance with both federal and state laws is physically impossible, or when state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives. *Inlandboatmen's Union*, at 702.

In the case of either field or conflict preemption, the essential inquiry is congressional intent. *Wisconsin Pub.*

Intervenor v. Mortier, 501 U.S. —, 115 L. Ed. 2d 532, 542, 111 S. Ct. 2476 (1991). In addition, “[t]here is a strong presumption against finding preemption in an ambiguous case, and the burden of proof is on the party claiming preemption.” (Footnote omitted.) *Inlandboatmen’s Union*, at 702.

The basis for Tacoma’s preemption argument is the FPA, which empowers FERC to license projects designed to develop power from any stream or other body of water over which Congress has jurisdiction. 16 U.S.C. § 797(a). The FPA, as amended in 1986 by the Electric Consumers Protection Act, also directs that in issuing such licenses FERC must “give equal consideration to the purposes of energy conservation, the protection, mitigation of damages to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.” 16 U.S.C. § 797(e). Congress further declared that FERC may not issue a license unless it judges the project to be “best adapted to a comprehensive plan” advancing these competing values. 15 U.S.C. § 803(a). In order to ensure this, the FPA requires FERC to consider recommendations from state and federal agencies and Indian tribes. 16 U.S.C. § 803(a)(2). In addition, in order to protect, mitigate damages to, and enhance fish and wildlife, the FPA requires FERC to adopt the recommendations of state and federal fish and wildlife agencies unless FERC believes such recommendations are inconsistent with the purposes of the FPA or other applicable law. 16 U.S.C. § 803(j)(1). FERC may reject the recommendations of state or federal fish and wildlife agencies, but it must publish its findings for doing so and state in those findings that its own conditions will comply with the FPA’s standards regarding fish and wildlife protection. 16 U.S.C. § 803(j)(2).

Tacoma argues that the FPA’s comprehensive scheme of licensing hydropower projects preempts Ecology from

setting streamflows in the section 401 certificate. The existence of the Clean Water Act and the authority and obligations given to the states under it make this argument unpersuasive.

Considering first field preemption, there is neither an express nor an implied indication of any congressional intent to occupy the field so as to preclude states from exercising their authority and fulfilling their obligations under the Clean Water Act. When the FPA and the Clean Water Act are considered together, the comprehensive scheme that emerges is one in which Congress left room for the states to supplement the FPA through the section 401 certification process. Enforcement of state laws is part of the federal scheme inasmuch as section 401 of the Act requires states to assure compliance with appropriate state laws. The comprehensive scheme consisting of both the Clean Water Act and the FPA presupposes rather than precludes the exercise of state authority. Consequently there is no basis for finding field preemption here.

As regards conflict preemption, there is no actual conflict between Ecology’s action and the FPA. Compliance with Ecology’s streamflow condition and the FPA is physically possible, and fulfillment of that condition does not stand as an obstacle to the accomplishment and execution of Congress’s purposes. Indeed, exactly the same streamflow condition could have been required directly under the FPA, either by FERC directly or by FERC adopting recommendations regarding streamflow from Ecology during the licensing process. Moreover, finding conflict preemption under circumstances such as those presented here would have the effect of requiring Ecology to guess which elements of the 401 certificate might conflict with actions FERC might take at a later time, and then decline to condition the certificate based on this guess—in violation of Ecology’s mandate under the Act. We cannot believe Congress could have intended to create such an administrative nightmare.

To support its preemption argument, Tacoma relies on *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 109 L. Ed. 2d 474, 110 S. Ct. 2024 (1990). There, FERC issued a license for a hydroelectric project and, in doing so, set a streamflow requirement in order to protect the fish in the affected portion of the river. The California Water Resources Control Board (WRCB) later issued an order requiring the licenses to conform to a higher streamflow requirement. 495 U.S. at 496. The WRCB relied on section 27 of the FPA, which provides:

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

FPA, § 27, 16 U.S.C. § 821. The Court rejected the WRCB's argument, and held that FERC's powers as granted under the FPA preempted the WRCB's attempt to set its own streamflow requirements. The Court explained that under the FPA, FERC's power is exclusive unless some power is explicitly reserved for the states, and that section 27's reservation of power does not include the power to set instream flows. According to the Court, the words of section 27 "are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." 495 U.S. at 498 (quoting *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 176, 90 L. Ed. 1143, 66 S. Ct. 906 (1946)).

Tacoma argues that Ecology is trying to do precisely what the WRCB was attempting to do in *California v. Federal Energy Regulatory Comm'n*, namely, set a minimum instream flow rate for a federally licensed power

project, and therefore Ecology is no less preempted by the FPA than was the WRCB.

The present case is distinguishable from *California v. Federal Energy Regulatory Comm'n* on two grounds. First, in *California v. Federal Energy Regulatory Comm'n*, there was an actual conflict between the federal and state governments. FERC and the California WRCB had both issued orders regarding streamflow, and those orders were in conflict. No such conflict exists in the present case. Second, in *California v. Federal Energy Regulatory Comm'n*, the Clean Water Act was not at issue or even mentioned. The issue was the scope of what powers had been saved to the states under section 27 of the FPA. The authority for California's action was not derived from federal law. Here, the issue is whether the FPA somehow precludes Ecology from exercising the authority granted it, and the responsibilities delegated to it, under the Clean Water Act. The way in which the Clean Water Act is implicated in the present case completely alters the legal context and renders untenable Tacoma's preemption argument. The presumption against finding preemption in ambiguous cases further strengthens this conclusion. See *Inlandboatmen's Union*, 119 Wn.2d at 702.

In short, whereas *California v. Federal Energy Regulatory Comm'n* presented a straightforward case of a state acting on its own authority, the present case is one in which Ecology derives authority for its action directly from federal law. State law and state action are involved only to the extent they are integrated into the Clean Water Act. Our interpretation of Ecology's duties under the Act, therefore, does not conflict with the United States Supreme Court's interpretation of the scope of the power reserved to the states under section 27 of the FPA.

We conclude that Tacoma has not carried its burden of establishing federal preemption.

IV

The Enhancement Issue

We next consider the Board's finding that Ecology's streamflow condition for the Elkhorn project enhances the fishery in the Dosewallip River. The trial court ruled that this was error. We agree.

A

Factual Background

To understand the Board's factual ruling regarding enhancement, it is necessary to review the nature of the study conducted to determine the instream flow. After Tacoma filed its initial application with Ecology for the section 401 certificate, Ecology asked Tacoma to conduct a study to determine what level of water should be maintained in the bypass reach in order to preserve adequate habitat for fish. Ecology also requested that Tacoma perform this study using a method known as "instream flow incremental methodology", or "IFIM". Generally, the IFIM process first involves collecting data about water velocity and depth, the substrate of the river, what species of fish inhabit the river, and what developmental stages the fish go through at what times of year. The data are then assembled to enable predictions about how the water depth and velocity will change at different flow levels, and to show what depths, velocities, and substrates are most suitable for each life stage of each fish species in the river. A computer program known as "PHABSIM" (for physical habitat simulator) is then run using this assembly of data. The output of the PHABSIM program includes a set of charts or tables. Each chart or table indicates for a given fish species and a given life stage of that species the "weighted usable area" available at different flow levels. "Weighted usable area", roughly, is how much area of the river the fish can use as habitat.¹ These are then used by fisheries

¹ More specifically, "[w]eighted usable area is an index computed by multiplying the surface area of a portion of a stream by a

biologists to determine the appropriate instream flows for the river.

In the present case, Tacoma and Ecology worked together in producing the results of the IFIM study, but then disagreed as to the appropriate instream flows. Tacoma claims that fish production will be preserved using the flow regime it has proposed, but that the flow regime Ecology imposed in the section 401 certificate would actually enhance fish production. The Board agreed with Tacoma. In its findings of fact, the trial court found the Board's conclusion to be clearly erroneous.

B

Standard of Review

The Board is one of four administrative boards comprising the environmental hearings office, which is created by RCW 43.21B.005. The members of the Board are appointed by the Governor with the advice and consent of the Senate. RCW 43.21B.020. When a Board decision is rendered pursuant to a formal hearing, as was the case here, judicial review is conducted pursuant to the Administrative Procedure Act, RCW 34.04 or RCW 34.05. (Because the present case was initiated prior to July 1, 1989, RCW 34.04 applies. RCW 34.05.902.) Under RCW 34.04.130(6)(a), the court may reverse an agency's determination if it was "clearly erroneous in view of the entire record". A finding is clearly erroneous when, although there may be evidence to support it, the reviewing court on the entire record is left with the firm and definite conviction that a mistake has been committed. *Cougar Mt. Assocs. v. King Cy.*, 111 Wn.2d 742,

weighting factor that describes the suitability of the stream for the organism of interest. It displays the surface area of stream in square feet of optimal habitat per 1,000 linear feet of stream." Cavendish & Duncan, *Use of the Instream Flow Incremental Methodology: A Tool for Negotiation*, 6 Env't Impact Assessment Rev. 347, 349 (1986).

747, 765 P.2d 264 (1988). Thus, the proper standard of review for the trial court to have used in evaluating the Board's factual determination was the clearly erroneous standard.

Furthermore, this court has stated that "[u]pon appeal from a superior court's application of the 'clearly erroneous' standard, the appellate court applies the same standard directly to the administrative decision." *Department of Ecology v. Ballard Elks Lodge* 827, 84 Wn.2d 551, 555, 527 P.2d 1121 (1974). Therefore, in the present case we apply the clearly erroneous standard directly to the Board's decision. Cf. *Schub v. Department of Ecology*, 100 Wn.2d 180, 183-84, 667 P.2d 64 (1983) (applying clearly erroneous standard directly to agency's determination rather than board's).

Finally, it is well settled that due deference must be given to the specialized knowledge and expertise of an administrative agency. E.g., *Schub*, 100 Wn.2d at 167. Here, Ecology was exercising its expertise in judging the appropriate instream flow rate for the Elkhorn project. Therefore, in analyzing the Board's decision under the clearly erroneous standard, we also give due deference to Ecology's expertise in this area.

C

The Board's Assessment of Ecology's Preservation Flow

At the hearing before the Board, there was testimony from six fisheries biologists representing five different states and federal agencies. These biologists were all involved in the IFIM study and in Ecology's setting of instream flow rates for the Dosewallips. Each expert testified that his or her intent in setting the flow rates, or the intent of the agency represented, was to preserve and protect the fishery in the Dosewallips, not to enhance

it.² In light of this testimony, it is manifestly unreasonable to believe that the agencies *intentionally* sought to enhance the Dosewallips fishery. Moreover, these experts also testified that in their opinions Ecology's flows would not in fact enhance the Dosewallips fishery. The one expert who testified for Tacoma, Phillip Hilgart, said that he could not tell whether Ecology's flow would enhance the fishery.

In light of this unrefuted testimony, the Board's conclusion that Ecology's flows would enhance the Dosewallips fishery is questionable. Apparently the Board assumed that spawning habitat is the limiting factor in fish production and then reasoned that Ecology's flow will increase fish production because it will provide more spawning habitat than is available under natural conditions. We find persuasive Ecology's position, shared by the trial court as well as the dissenting member of the 3-person Board, that this reasoning is erroneous.

First, the Board appears not to have adequately considered the uncertainty inherent in the computer modeling of the complex biological systems of the river. For example, the PHABSIM model uses only three of the many variables that determine fish habitat. The three variables PHABSIM uses are water depth, water velocity, and substrate. There was testimony before the Board, however, that there are other important flow-related habi-

² E.g., testimony of Hal Beecher, Department of Wildlife fisheries biologist, Transcript of Proceedings (Dec. 15, 1987), at 167; testimony of Kenneth Bruya, Department of Fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 138-39; testimony of Brad Caldwell, Department of Ecology fisheries biologist, Transcript of Proceedings (Dec. 16, 1987), at 104; testimony of Jean Caldwell, Department of Fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 48; testimony of Stephen Ralph, Point No Point Treaty Council fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 110; testimony of Elaine Rybak, United States Fish & Wildlife Service fisheries biologist, Transcript of Proceedings (Dec. 17, 1987), at 98.

tat variables, including (1) predation, (2) competition and territoriality, (3) sedimentation and its effect on eggs and food supplies, (4) the adequacy of flows to prevent eggs from dehydrating, and (5) the creation of barriers to migration. Because PHABSIM's predictions regarding fish habitat are based on this artificial concept of habitat, Ecology's biologists were conservative in their estimation of the flows that would best protect the fishery, and there was no evidence that the flows would in fact enhance the fishery.

The Board also ignored the fact that one of the three habitat variables the PHABSIM model uses was incomplete. In particular, the PHABSIM model is designed for three measurements regarding water velocity. Because of the difficulties in getting measurements for the Dosewallips, however, only one measurement was used in the IFIM study conducted here. This further underscores the appropriateness of Ecology's conservative approach to setting minimum instream flows.

Furthermore, the Board assumed that the amount of fish habitat available under natural conditions can be reliably measured by reference to the river's "50 percent exceedence flow." The 50 percent exceedence flow for a river is that level of flow at which half the daily flows during a 1-month period are lower and half the daily flows are higher. The testimony was that for a river like the Dosewallips, the flow of which changes constantly and dramatically, the 50 percent exceedence flow may be meaningless as a measure of normal conditions. In her dissent, Board member Bendor points out that in 1 month, 210 cfs was the 50 percent exceedence flow whereas 800 cfs was the average flow.

The Board also erroneously assumed that because the computer model maximizes for an "optimum" flow regime for fish, this means that overall fish production will be increased. The record before us indicates that FHABSIM optimizes a flow regime only in the sense that for a given

species and a given life stage of that species, the model predicts at what flow the largest amount of weighted usable area of habitat will be present. Even on the sanguine assumption that maximizing weighted usable area is "optimum" for that life stage of that species, the same flow regime may not be optimum for other life stages of the same species or for other species.

Finally, the Board overlooked the uncertainty in the assumption that the limiting factor in fish production in the Dosewallips is spawning habitat. There was expert testimony, including testimony from Tacoma's expert witness Phillip Hilgert, that it is uncertain whether fish productivity in the bypass reach is spawning limited. The testimony regarding this assumption was at best equivocal. Mr. Hilgert at one point testified that "streams in Western Washington are *rearing* limited, and indeed much of the agencies' harvest management practice is based on the assumption of rearing limitations." (*Italics ours.*) Transcript of Proceedings (Dec. 16, 1987), at 33. Another expert testified he has never believed that the Dosewallips is spawning limited.

Our examination of the record leaves us with the firm and definite conviction that a mistake has been made. Ecology's intent was clearly to preserve, not to enhance, the fishery in the Dosewallips, and the Board's reasoning for its view that Ecology's flows would enhance the fishery is insupportable. Therefore we hold the Board's finding that Ecology's instream flow rates are an enhancement flow is clearly erroneous. Because we so hold, we need not reach the question whether Ecology has the authority to enhance the Dosewallips fishery by a base flow requirement in the section 401 certificate.

V

Conclusion

We hold that federal law does not preempt Ecology from including minimum streamflow conditions in Tacoma's section 401 certificate, and that the Board erred in finding that Ecology's flows would enhance the Dosewallips fishery. We therefore conclude that the section 401 permit is valid as originally issued by Ecology. The Superior Court is affirmed.

/s/ Guy, J.

WE CONCUR:

/s/ Andersen, C.J.

/s/ Durham, J.

/s/ Utter, J.

/s/ Smith, J.

/s/ Brachtenbach, J.

/s/ Johnson, J.

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

No. 89-2-00413-2

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES, AND WILDLIFE,
Appellants,

v.

PUD No. 1 OF JEFFERSON COUNTY
and CITY OF TACOMA,
Respondents.

PUD No. 1 OF JEFFERSON COUNTY
and CITY OF TACOMA,
Appellants,

v.

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES, AND WILDLIFE,
Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL JUDGMENT

[Filed Aug. 14, 1991]

This matter is an appeal of a decision of the Pollution Control Hearings Board (the Board or PCHB), PCHB No. 86-118. The PCHB conducted a full evidentiary hearing in this matter on December 15-18, 1988. In this proceeding, testimony was taken, and documentary evi-

dence was submitted. The PCHB issued its final decision on January 25, 1989.

The State Department of Ecology (respondent before the PCHB), and the State Departments of Fisheries and Wildlife (intervenors before the PCHB) appealed the decision of the PCHB to this Court on February 24, 1989. The City of Tacoma and PUD No. 1 of Jefferson County cross-appealed the PCHB's decision to this Court on March 1, 1989.

Appellant Department of Ecology has appeared in this matter by Jay J. Manning, Assistant Attorney General. Appellants Department of Fisheries and Department of Wildlife appeared by William C. Frymire, Assistant Attorney General. Cross-Appellants PUD No. 1 of Jefferson County and City of Tacoma appeared by Mark L. Bubenik, Assistant City Attorney, and Albert R. Malanca of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim for Tacoma.

This Court has reviewed the entire record produced before the PCHB, the file herein, including both parties' briefs, and has been presented with oral argument from all parties. On May 8, 1991, the Court issued a Memorandum Opinion. A copy of the Memorandum Opinion is attached as Exhibit 1 and is incorporated into this Final Judgment by this reference. Based on all of the foregoing, the Court makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT

I.

The Court hereby adopts and accepts the PCHB's Findings of Fact I-VIII, and X. These Findings of Fact are set forth below for the convenience of the reader.

Finding of Fact I

This matter concerns the Dosewalips [sic] River on the Olympic Peninsula of Washington.

Finding of Fact II

Appellants (hereafter Tacoma) propose to construct a hydroelectric project on the Dosewalips River. The project would consist of a weir which would divert water into a pipeline that parallels the course of the river but initially remains somewhat level as the river descends downstream. At the downstream end of the pipeline, water would fall through a generator and then be discharged back into the river.

Finding of Fact III

The effect of Tacoma's project would be to reduce the river flow in the segment of the Dosewalips River paralleled by the pipeline. That segment of the river is fairly steep and canyon-like. The natural flows through this "by-pass reach" are vigorous during most of the year. These natural flows are essentially undiminished by appropriation at present.

Finding of Fact IV

Tacoma's hydroelectric proposal must be licensed by the U.S. Federal Energy Regulatory Commission (FERC). Under Section 401 of the Federal Clean Water Act the respondent, Washington State Department of Ecology (DOE), must certify compliance with state water quality requirements. We have previously ruled that such a certification may include base flow limitations in the by-pass reach of the Dosewalips River pursuant to RCW 90.54.020 (3)(a) of the State Water Resources Act, of 1971. See "Order Granting Cross Motion for Summary Judgment" entered April 10, 1987.

Finding of Fact V

The base flows for the by-pass reach of the Dosewallips, as contained in DOE's Section 401 Water Quality Certification, were appealed by Tacoma. The notice of appeal was filed before us on July 11, 1986. Following pre-hearing motions, the issues remaining for hearing were reduced to the following:

1. Whether the specific base flows imposed by DOE in this instance are appropriate for the preservation of the fishery resource and related values?
2. What quantity and type of fish inhabit the waters to be affected by the base flows prescribed by DOE?

Finding of Fact VI

Taking the second issue first, we find that the by-pass reach is inhabited by steelhead and, to a lesser extent, both Coho and Chinook salmon. The quantities of these fish are sufficient to justify base flows tailored to the life cycles of those species.

Finding of Fact VII

As to the first issue, appropriateness of the DOE flow regime, we find as follows.

Finding of Fact VIII

Instream Flow Incremental Methodology. The respondents urged or required that Tacoma conduct a study of the by-pass reach using Instream Flow Incremental methodology (IFIM). This method is generally agreed to be the "state of the art" method for analyzing water flow as related to fish habitat. Under it, a computer modeling study is used to determine "weighted usable area" in a given length of river when flows are varied. The weighted usable

area is an indicator of fish habitat and hence fish production.

Finding of Fact X

Other factors than those considered in the IFIM study may affect fish production. Some may be flow related such as predation, competition, cover and out-migration. Some are not flow related, such as overharvest. These factors were not specifically evaluated in the setting of the base flows at issue. No empirical evidence regarding these factors was considered in setting the base flows.

A 1980 study, by Mathews and Olson, points out a relationship between stream flow and Coho salmon production in Puget Sound. Initially, studies showed a correlation between annual water runoff from western Washington streams and the commercial catch of Coho in western Washington. This correlation did not last over time, however. Later a similar correlation appeared between summer runoff and the Coho catch. These correlations, changing over time and global in their application to all streams of western Washington, do not materially impair the credibility of the specific IFIM studies conducted in the by-pass reach showing that flow reduction there indicates improved spawning habitat and, therefore, improved fish production potential.

II.

In Findings of Fact IX and XI, the PCHB found that the minimum flow regime required by the Department of Ecology in this matter is, in fact, an "enhancement" flow regime. In effect, the PCHB ruled that the minimum flow regime required by Ecology would in fact increase the amount of habitat available in the Dosewallips in the affected portion of the Dosewallips River and, consequently, fish production in the affected portion of the river.

In reaching this factual finding, the PCHB made a number of fundamental errors. First, the PCHB ignored the bulk of the evidence presented, most of it in the form of expert testimony presented on behalf of the respondent agencies, which supported the agencies' position that the Ecology minimum flow regime was just that, a *minimum* flow regime. This agency flow regime was designed and intended to protect and preserve the fishery resource in the affected portion of the river. The agencies neither intended nor did they in fact set a flow that would "enhance" fish habitat or fish production in the affected portion of the river.

Second, the PCHB mistakenly found a computer model's output (in the form of tables showing square feet of useable habitat at various flow levels) to be a true and accurate representation of actual fish habitat. As was explained repeatedly to the PCHB, the computer model's output, referred to as weighted useable area tables, is simply one indicator of the amount of physical habitat available which takes into account only three variables of habitat. The evidence presented to the PCHB strongly supports the agencies' position that weighted useable area is not the equivalent of habitat, but rather is only a crude indicator of the amount of habitat available.

In sum, after reviewing the entire record, this Court is left with a definite and firm conviction that the PCHB's factual finding that the agency flow regime is an enhancement flow regime is a mistake and is incorrect.

III.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, this Court now makes these

CONCLUSIONS OF LAW

The Court set forth its Conclusions of Law in the May 8, 1991, Memorandum Opinion. The Court hereby

incorporates that Memorandum Opinion, and in particular, the Conclusions of Law set forth therein.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Court enters the following:

JUDGMENT

The decision of the PCHB is affirmed in part and reversed in part. The PCHB's decision that the minimum flow condition required by Ecology in this matter is not preempted by federal law is hereby affirmed. The PCHB's decision that the Ecology-imposed minimum flow regime is an enhancement flow regime is hereby reversed. Finally, the PCHB's conclusion that RCW 90.54.020(3) does not allow an enhancement flow condition under the circumstances presented by this case is reversed.

DATED this 14th day of August, 1991.

/s/ Carol A. Fuller
CAROL A. FULLER
Judge

Presented by:

/s/ Jay J. Manning
JAY J. MANNING
Assistant Attorney General
Attorney for Dept. of Ecology

/s/ William C. Frymire
WILLIAM C. FRYMIRE
Assistant Attorney General
Attorney for Dept. of F & W

/s/ Mark L. Bubenik by Albert R. Malanca
MARK L. BUBENIK
Assistant City Attorney

36a

/s/ Albert R. Malanca
ALBERT R. MALANCA
Attorneys for City of Tacoma and
Jefferson County PUD No. 1

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APPENDIX D

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

No. 89-2-00413-2

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES AND WILDLIFE,
Petitioners,

v.

PUD No. 1 OF JEFFERSON COUNTY and
CITY OF TACOMA,
Respondents.

PUD No. 1 OF JEFFERSON COUNTY and
CITY OF TACOMA,
Cross-Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENTS OF ECOLOGY,
FISHERIES AND WILDLIFE,
Cross-Respondents.

MEMORANDUM OPINION

This matter came before the Court on cross appeals from the decision of the Pollution Control Hearings Board. The petitioners are seeking review of the Board's holding that federal law does not pre-empt the actions of the agencies, while the agencies seek review of the Board's holding that the flow levels established by the agencies

constitute an enhanced environment, and, thus, an ultra vires act.

The facts in this case are as follows. In 1982, the City of Tacoma and the PUD began planning to construct a hydroelectric project at the Elkhorn site on the Dosewallips River in Jefferson County. If approved, this project will be constructed along a 1.2 mile stretch of the Dosewallips outside the Olympic National Park. It is estimated that the project will divert up to 600 cubic feet per second (cfs). The species of fish that would be affected by the diversion are steelhead trout, and coho and chinook salmon.

To build this project, the City of Tacoma is required to obtain a license from the Federal Energy Regulatory Commission (FERC). FERC, as part of the license application process, required Tacoma to obtain a Water Quality Certificate from the Washington Department of Ecology.

In acting on the application for this certificate, the Department found that an Instream Flow, Incremental Method (IFIM) study would best assist in determining what part of the natural river flow should remain along the affected portion of the river in order to protect the fisheries presently in the river. Tacoma conducted an IFIM study during the period 1983 to 1985, and as a result of the study proposed a flow regime ranging from 65 cfs to 155 cfs, depending upon the month.

Several months later, the Department proposed its own flow regime, ranging from 100 to 200 cfs. In response, Tacoma proposed a revised flow regime ranging from 65 cfs to 170 cfs.

After considering these various proposals, the Department issued the water quality certification presently under appeal. This certification required that the minimum instream flow be maintained in accordance with the

flow regime proposed by the Department, ranging from 100 cfs to 200 cfs, depending on the month.

Tacoma appealed this decision to the Washington State Pollution Control Hearings Board. The Board held that the applicable federal statute did not preempt the Department's action in setting the minimum instream flows, but did hold that the levels set by the Department were designed to enhance the fishery, and, thus, exceeded the Department's statutory authority. The parties have cross appealed on these two issues.

I. Federal Preemption

In arguing preemption, Tacoma relies primarily on *California v. FERC*, — U.S. —, 110 S.Ct. 2024 (1990) for the proposition that FERC has superior authority to establish minimum stream flows than does the Washington Department of Ecology, while recognizing the existence of 33 U.S.C. § 1341(d), the provision relied on by the Department.

33 U.S.C. § 1341(d) provides as follows:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act [33 USCS § 1311 or 1312], standard of performance under section 306 of this Act [33 USCS § 1316], or prohibition, effluent standard, or pretreatment standard under section 307 of this Act [33 USCS § 1317], and with any other appropriate requirements of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section. (Emphasis added)

While 33 U.S.C. § 1341(d) would appear, at first reading, to permit state action to protect wildlife, *California*

v. *FERC's* holding that FERC preempts state action setting higher minimum stream flows than FERC must be examined.

California is a case where the facts are very similar to those found in the present case. The Rock Creek hydroelectric project was designed to draw water from the creek and then return it to the river slightly less than a mile away. The primary issue was who was permitted to set the minimum flow rate that must remain within the bypassed section of the creek. Initially, FERC issued a license in 1983, which set interim minimum flow rates after giving consideration to the economic feasibility and environmental effects of the project. These were set in a range of 11 cfs to 15 cfs. After study, the applicant recommended that these be adopted as the permanent rates, while the California Department of Fish and Game recommended significantly higher minimum flow rates.

In the meantime, in 1984, the state water permits were issued which set the interim minimum flow rates in conformity with the FERC rates, but reserved the right to impose higher permanent rates. In 1984 the state authority suggested that the permanent minimum flow rates should be in the range 30 cfs to 60 cfs.

Finally, after an administrative hearing FERC set the permanent minimum flow rate at 20 cfs throughout the year. Four days later the state board issued an order directing the applicant to maintain the flow rates in the range 30 cfs to 60 cfs.

The Supreme Court held that the California requirements for minimum in-stream flows cannot be given effect:

As Congress directed in FPA § 10(a), FERC set the conditions of the license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project

would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would "constitute a veto of the project that was approved and licensed by FERC."

California, 110 S.Ct. at 2033.

Federal preemption of state law is governed by the intent of Congress.

Congressional intent to preempt state law may be found in three ways. First, Congress may express a clear intent to preempt state law. Second, the "scheme of federal regulation [may be] sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." Third, preemption will be found when there is an actual conflict between federal and state law where (1) compliance with both the federal and state law is physically impossible, or (2) the state law is an 'obstacle' to the "full purposes and objectives of Congress."

In Washington, there is a strong presumption against finding preemption. Preemption may be found only if federal law "clearly evinces a congressional intent to preempt state law", or there is such a " 'direct and positive' " conflict "that the two acts cannot 'be reconciled or consistently stand together'."

Labor & Industries v. Common Carriers, 111 Wn.2d 586, 588, 762 P.2d 348 (1988) (citations omitted).

Under the facts of the *California* case, the key fact in the decision was the fact that FERC had issued its determination of what the minimum instream flow rate would be prior to the action by the California Water Board. Under 33 U.S.C. § 1341, California would properly be found to be preempted. Here, on the other hand, it has not been shown that FERC has made a decision on what the minimum instream flow rates should be. Under 33 U.S.C. § 1341 it is clearly recognized that consideration should be given of state standards. See also 16 U.S.C. § 803(j)(1). Therefore, up to the point when FERC has made its determination, Washington has authority to determine what it considers to be necessary minimum instream flow rates. Since Tacoma has not shown that FERC has acted, preemption will not be found. The decision of the Board on this issue will be affirmed.

II. Minimum Instream Flow Rates

Judicial review of this case is under RCW 34.04.130, in as much as it was commenced at the administrative level prior to July 1, 1989. RCW 34.05.902. Under RCW 34.04.130(6),

the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority of jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) clearly erroneous in view of the entire record as submitted and the public policy contained in the

act of the legislature authorizing the decision or order; or

(f) arbitrary or capricious

The Department asserts that the decision of the Board holding the flow rates proposed by the Department operated to enhance the existing fishery and were, thus, outside the Department's authority is either clearly erroneous or affected by other error of law.

A decision is clearly erroneous if, having reviewed the entire record and having considered the public policy behind the legislation, the court is left with the firm and definite conviction that a mistake has been committed. *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 765 P.2d 264 (1988). This result follows even if there is some supporting evidence for the decision. *Johns v. Employment Security*, 38 Wn.App. 566, 686 P.2d 517 (1984).

On the other hand, in reviewing under the error of law standard, the court will conduct a de novo review and may substitute its judgment for that of the agency. *Inland Empire v. Utilities & Transportation*, 112 Wn.2d 278, 770 P.2d 624 (1989).

Here the primary issue raised by this case is whether the Board was clearly erroneous in finding that the Department's proposed flow rates will enhance the natural fisheries present in the bypass portion of the river. A secondary issue is whether a flow rate that may enhance the natural fishery constitute an ultra vires action, in that it does more than preserve the natural fishery?

With respect to the primary issue, I have reviewed the entire record in this matter, and have given consideration to the public policy behind the legislation and to the arguments of counsel. This record leaves me with a firm and definite conviction that the Board erred in finding that the flow rates proposed by the Department constitute

a rate of flow which will enhance the naturally existing fishery in the Dosewallips. Since the burden of proof was on Tacoma to prove that the Department's flow rates enhanced the fishery, its failure to prove that the Department's flows did more than preserve the potential habitat existing in the river and, in fact, enhanced the natural fishery requires that the Board's decision be reversed.

Having based my decision on the first issue, it is not necessary to examine the secondary issue. However, I conclude that the Board was incorrect in concluding that a flow rate that may result in an enhancement constitutes an ultra vires action.

The statute which gives rise to this issue is RCW 90.54.020(3), which provides that

The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that the overriding considerations of the public interest will be served.

The Board concluded that the only base flows authorized by this statute are those "necessary to provide for the preservation of" fish, and that, since the base flows adopted by the Department enhanced the natural state of the river, these base flows exceeded the Department's authority. In so concluding, the Board limited the applicability of the prefatory phrase "and where possible, enhanced" to those situations where "paper water" existed, or where water rights had been abandoned in rivers which had been over-appropriated.

The Department argues that this portion of the statute is clear and unambiguous, should be given its plain and ordinary meaning, *State v. Theilken*, 102 Wn.2d 271, 684 P.2d 709 (1984), and that the conclusion of the Board limits the language of the Legislature in an unwarranted manner.

The Court must agree with the Department. While the situations suggested by the Board may be the most common situations when enhancement can occur, they are not the only situations. This river will have portions of its waters diverted. The question is to what degree. Since it is possible to fix a base flow that will enhance the fishery while still permitting development of the river, the Department correctly determined that it should fix a base flow that would optimize all varieties of fish in the river.

Dated this 8 day of May, 1991.

/s/ Carol A. Fuller
CAROL A. FULLER
Judge

APPENDIX E

**BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

PCHB No. 86-118

IN THE MATTER of a Section 401 Water Quality Certification granted by Department of Ecology PUD No. 1 of Jefferson County and City of Tacoma

**PUD No. 1 OF JEFFERSON COUNTY, AND CITY OF
TACOMA, DEPARTMENT OF PUBLIC UTILITIES,**
Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY
Respondent,
and

**STATE OF WASHINGTON DEPARTMENT OF WILDLIFE
DEPARTMENT OF FISHERIES**
Intervenors.

**REVISED FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

This matter is the appeal of base flows contained within a Water Quality Certification, granted by respondents with respect to a hydroelectric proposal by appellants.

The matter came before the Pollution Control Hearings Board, Wick Dufford, Chairman, Lawrence J. Faulk, Member, and Judith A. Bendor, Member. William A. Harrison, Administrative Appeals Judge presided.

The hearing was conducted at Lacey, Washington, on December 15, 16, 17 and 18, 1988.

Appellants appeared by Mark L. Bubenik, Assistant City Attorney for Tacoma. Respondent, State Department of Ecology appeared by Jay J. Manning, Assistant Attorney General. Respondent Intervenors State Departments of Wildlife and Fisheries appeared by William C. Frymire, Assistant Attorney General. Reporter, Gene Barker and Associates provided court reporting services. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Witnesses were sworn and testified. Exhibits were examined. Closing Briefs were filed on February 4, 1988. From testimony heard and exhibits examined, the Pollution Control Hearings Board issued a decision on June 29, 1988, with a dissent, following. The respondents filed a Petition for Reconsideration. Appellants filed a Memorandum in Opposition. A copy of the transcript was filed. Board Member Harold S. Zimmerman has reviewed the record. After reconsideration, the Board issues this revised decision:

FINDINGS OF FACT

I

This matter concerns the Dosewalips [sic] River on the Olympic Peninsula of Washington.

II

Appellants (hereafter Tacoma) propose to construct a hydroelectric project on the Dosewalips River. The project would consist of a weir which would divert water into a pipeline that parallels the course of the river but initially remains somewhat level as the river descends downstream. At the downstream end of the pipeline, water would fall through a generator and then be discharged back into the river.

III

The effect of Tacoma's project would be to reduce the river flow in the segment of the Dosewalips River paralleled by the pipeline. That segment of the river is fairly steep and canyon-like. The natural flows through this "by-pass reach" are vigorous during most of the year. These natural flows are essentially undiminished by appropriation at present.

IV

Tacoma's hydroelectric proposal must be licensed by the U.S. Federal Energy Regulatory Commission (FERC). Under Section 401 of the Federal Clean Water Act the respondent, Washington State Department of Ecology (DOE) must certify compliance with state water quality requirements. We have previously ruled that such a certification may include base flow limitations in the by-pass reach of the Dosewalips River pursuant to RCW 90.54.020(3)(a) of the State Water Resources Act, of 1971. See "Order Granting Cross Motion for Summary Judgment" entered April 10, 1987.

V

The base flows for the by-pass reach of the Dosewalips, as contained in DOE's Section 401 Water Quality Certification, were appealed by Tacoma. The notice of appeal was filed before us on July 11, 1986. Following pre-hearing motions, the issues remaining for hearing were reduced to the following:

1. Whether the specific base flows imposed by DOE in this instance are appropriate for the preservation of the fishery resource and related values?
2. What quantity and type of fish inhabit the waters to be affected by the base flows prescribed by DOE?

VI

Taking the second issue first, we find that the by-pass reach is inhabited by steelhead and, to a lesser extent,

both Coho and Chinook salmon. The quantities of these fish are sufficient to justify base flows tailored to the life cycles of those species.

VII

As to the first issue, appropriateness of the DOE flow regime, we find as follows.

VIII

Instream Flow Incremental Methodology. The respondents urged or required that Tacoma conduct a study of the by-pass reach using Instream Flow Incremental methodology (IFIM). This method is generally agreed to be the "state of the art" method for analyzing water flow as related to fish habitat. Under it, a computer modeling study is used to determine "weighted usable area" in a given length of river when flows are varied. The weighted usable area is an indicator of fish habitat and hence fish production.

IX

The respondents regard spawning as the limiting factor in fish production within the by-pass reach. The IFIM data show that when the natural, vigorous flow of river in the by-pass reach is decreased, spawning habitat actually improves. The base flows in this matter were set by selecting, in each month where spawning occurs, that flow¹ which produces 100% of the weighted usable

¹ The optimum fish flow adopted in this matter was deemed consistent, in testimony from the Department of Wildlife, with the following Department of Wildlife draft policy on instream flow:

Minimum instream flows are flows which maximize habitat for flow-dependent fish and wildlife; minimum flows are not less than optimum flows. Any reduction of flow below minimum instream flow reduces habitat. Additional flow above minimum instream flow does not increase habitat. Natural flows are sometimes less than minimum instream flow, but any prolonging of natural, subminimum instream flow will adversely impact fish and wildlife.

area using the IFIM data. This constitutes an optimum flow regime for fish where, as here, spawning is the factor limiting further fish production. Moreover, this also constitutes a flow regime which, for fish, is potentially superior to that provided by the natural flow of the Dose-walips River in the by-pass reach.

X

Other factors than those considered in the IFIM study may affect fish production. Some may be flow related such as predation, competition, cover and out-migration. Some are not flow related, such as overharvest. These factors were not specifically evaluated in the setting of the base flows at issue. No empirical evidence regarding these factors was considered in setting the base flows.

A 1980 study, by Mathews and Olson points out a relationship between stream flow and Coho salmon production in Puget Sound. Initially, studies showed a correlation between annual water runoff from western Washington streams and the commercial catch of Coho in western Washington. This correlation did not last over time, however. Later a similar correlation appeared between summer runoff and the Coho catch. These correlations, changing over time and global in their application to all streams of western Washington, do not materially impair the credibility of the specific IFIM studies conducted in the by-pass reach showing that flow reduction there indicates improved spawning habitat and, therefore, improved fish production potential.

XI

Tacoma has proposed base flows, using the same IFIM data, that were not accepted by DOE. Tacoma's proposed base flows were selected to equal or exceed the weighted useable area provided by the natural flow of the river for all life cycles of the fish species at issue. The existing, natural flow of the river was deemed by Tacoma to be the "50% exceedence flow" in the IFIM data. This

is the median daily flow meaning half the time daily flows are more and half the time daily flows are less. Tacoma's proposed base flows provide weighted usable area equaling or exceeding that provided by the existing natural flow as depicted by the 50% exceedence flow. A summary of pertinent flows is as follows:

| Month | Existing (50% Exceedence flow) (CFS) | DOE Base Flow (CFS) | Tacoma's Proposed Base Flow (CFS) |
|-------|---|---------------------------|---|
| Jan. | 340 | 140 | 100 |
| Feb. | 302 | 100 | 75 |
| March | 325 | 200 | 145 |
| April | 408 | 200 | 130 |
| May | 689 | 200 | 105 |
| June | 738 | 200 | 105 |
| July | 448 | 200 | 90 |
| Aug. | 222 | 200 | 170 |
| Sept. | 159 | 150 | 150 |
| Oct. | 149 | 140 | 140 |
| Nov. | 285 | 140 | 95 |
| Dec. | 397 | 140 | 75* |

Although additional data might present a more nearly representative picture, we find that the 50% exceedence flow is an appropriate indicator of the existing flow conditions in the river. Because reduction in flows improves fish habitat to a point where further reductions reverse the trend, the IFIM data shows that existing flow and Tacoma's proposed base flows have similar habitat value while DOE's base flow has habitat value greater than either. Respondents have not made any independent determination of existing fish habitat value in setting the DOE base flow.

* Initially proposed as 65 CFS this flow was the subject of testimony at hearing during which Tacoma stipulated to the higher flow proposal to protect egg incubation.

XII

Any Conclusion of Law deemed to be a Finding of Fact is here by adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

Base flows in perennial rivers of the state are prescribed and authorized by the State Water Resources Act of 1971, Chapter 90.54 RCW. In pertinent part, that act provides at RCW 90.54.020 as follows:

90.54.020 General declaration of fundamentals for utilization and management of waters of the state

Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

(1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

(2) *Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state.* Maximum net benefits shall constitute total benefits less costs including opportunities lost.

(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) *Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.* Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(b) Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served. (*Emphasis Added.*)

II

Tacoma first urges that base flows may not be set at levels which provide the optimum flow regime for fish. We agree. In *Northwest Steelhead and Salmon Council, et al. v. State Department of Ecology, et. al.*, PCHB 81-148 (1983) we concluded that base flows represent a statutory allocation for the environment to be taken out before the maximum net benefits formula is applied. In that case, however, the base flows adopted by DOE were below the optimum for fish. We concluded that flows in excess of the base flow were subject to the maximum net benefits rule, thereby potentially including flows which would be the optimum for fish. We held that:

"The maximum net benefits requirement of the WRA [Water Resources Act] does not guarantee the optimum flows for fish, nor guarantee that existing fish habitat will be enhanced. Neither does it guarantee that all flows in excess of instream [base] flows shall be available for diversion. Rather, it calls for the balancing of competing, beneficial uses." *Northwest Steelhead, supra*, at Conclusion of Law IX, p. 16. [Brackets added.]

This balancing of competing, beneficial uses applies only to the marginal flow above the base flow, and not to the base flow itself. Yet if, as here, the optimum flow regime for fish is adopted as the base flow, that optimum fish flow is guaranteed without any portion of it being subjected to the maximum net benefits test. This is not consistent with DOE's earlier adoption of base flow in *Northwest Steelhead, supra*, nor with our holding therein.

Moreover, the adoption of optimum fish flows as base flow leaves barren the statutory admonition that water uses, which by RCW 90.54.020(1) includes fish maintenance and enhancement, shall be allocated under the maximum net benefit rule of RCW 90.54.020(2). While, as DOE urges, the maximum net benefit rule applies only to "potential" uses, that limitation would exclude only certain maintenance flows, such as those adopted by DOE as base flows in *Northwest Steelhead, supra*. By contrast, the optimum fish flows adopted in this case introduce the potential for enhanced fish use in competition with the potential hydroelectric use, while impermissibly dispensing with the statutory maximum net benefits test.

The optimum fish flows adopted as base flows by DOE in this matter are inconsistent with RCW 90.54.020(2) in that the incremental portion of these flows constituting fish habitat enhancement were not subjected to a maximum net benefit test.

III

The optimum fish flows adopted as base flows by DOE are also inconsistent with the statutory authorization for base flows. Base flows, as authorized at RCW 90.54.020(3)(a), are those "necessary to provide for preservation of" fish and related values. The term "preservation" is not specifically defined, nor ambiguous. Words in a statute should be given their ordinary meaning absent ambiguity or statutory definition. *Garrison v. State Nursing Board*, 87 Wm. 2d 195, 550 P. 2d 7 (1976). Dictionaries may be used to ascertain the common meaning of statutory language. *Garrison, supra*; *East v. King County*, 22 Wn. App. 247, 589 P2d 805 (1987). The term "preservation" means "the act of preserving" while the root word "preserve", means "to keep safe from injury, harm or destruction". *Webster's Third New International Dictionary*, 1974 (1971). The evidence in this matter is that the optimum fish flows adopted as base flows enhance fish habitat beyond that provided by the river in its natural state. This is inconsistent with the statutory plan that base flows "keep safe" or preserve the fish habitat, rather than enhance it.

IV

Respondent, DOE, urges that it may enhance fish habitat through base flows because of the prefatory wording of RCW 90.54.020(3) which states:

The quality of the natural environment shall be *protected* and, *where possible, enhanced* as follows:
... (Emphasis added.)

The "preservation" language for base flows then follows at RCW 90.54.020(3)(a) as do the requirements for wastes proposed for entry into the water at RCW 90.54.020(3)(b). The prefatory wording provides that the environment shall be "protected" in all cases. The word

"protect" means "to cover or shield from that which would injure or destroy or detrimentally affect. *Webster's, supra*, 1822. Thus the term "protected" is kindred in meaning to the term "preservation" applicable to base flows. By contrast, the word "enhance" means "advance, elevate, augment, heighten or increase". *Webster's, supra*, 753. The key to understanding this prefatory wording is that while it uses the terms "protected" and "enhanced", which are distinguishable from one another, it provides for protection in all cases but provides for enhancement only "where possible".

Here it is noteworthy that the Water Resources Act of 1971, Chapter 90.54 RCW, was enacted relatively recently in the history of Washington water law. At the time of its enactment, many rivers and streams had long been subject to appropriations diverting their waters for various uses. Thus while the base flows were intended to "protect" all rivers, some were already over-appropriated to meager flow levels by 1971. In *Northwest Steelhead, supra*, summer flows in the Green River had been reduced by pre-1971 appropriations to low levels. In that matter, DOE adopted a base flow which exceeded the actual flow in the river at low summer levels. The amount by which base flow exceeds actual flow is sometimes referred to as "paper water" in recognition of the fact that it exists only on paper and not in real life. Yet the worthwhile object of establishing "paper water" is that when in the future, existing appropriators may abandon or forfeit their water rights the associated waters can be devoted to filling out the base flow, and thereby remain in the river. In this fashion the quality of a river already degraded by over-appropriation when the base flow legislation was enacted can be "enhanced" by base flows. This is the situation contemplated by the prefatory language in calling for enhancement "where possible". The matter at hand, however, is not that sit-

uation. Rather, the river at issue is flowing in its essentially natural state. Its fish producing potential may be preserved at this natural level through the adoption of base flows. But unlike a river degraded by over-appropriation, this river, in its natural state, may not be subjected to base flows calculated to enhance its natural productivity. Were that not the case, the phrase "where possible" used in connection with "enhanced" would be deprived of meaning along with the terms "protected" and "preservation". Base flows would then be wrongly understood to be enhancement flows in all instances.

We conclude that the base flows at issue enhance the fish producing potential of a river flowing in its essentially natural state, and are therefore inconsistent with RCW 90.54.020(3)(a) limiting base flows to those necessary "to provide for preservation" of fish.

V

Tacoma has shown that its proposed base flows (*see* Finding of Fact XI, above) will probably preserve the fish habitat and productivity now provided by the by-pass reach flowing in its natural state. These base flows therefore represent the correct application of RCW 90.54.020 (3)(a) to the facts of this case.

VI

Other matters than fish preservation made pertinent to base flows by RCW 90.48.020(3)(a) are not, in this case, sufficient to sustain the base flows adopted by DOE nor sufficient to justify base flows greater than those proposed by Tacoma.

VII

As we have concluded earlier, base flows are only a first step in determining the ultimate allocation of water between competing uses. Nothing herein precludes the ultimate allocation of flows greater than the base flow for fish enhancement. If respondents pursue such a course

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under state law, the maximum net benefits test of RCW 90.54.020(2) would apply to flows greater than base flows. If respondents pursue such a course under federal law in FERC proceedings, nothing herein is intended to indicate whether base flows are the maximum flows which ought to be allocated to fish productivity.

VIII

In reaching our conclusions in this case, we do not render any view as to whether state law should mandate, without consideration of other water uses, 1) enhancement flows to optimize fish productivity or 2) base flows necessary to preserve fish productivity. We hold only that the latter is all the state law now requires—leaving additional allocations for fish to a balancing process. Whether the law should be retained in its present form or changed is a broad question of policy properly addressed to the legislature.

IX

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

The base flows within the water quality certification are hereby vacated. This matter is remanded for reissuance of the water quality certification in accordance with this decision.

DONE at Lacey, WA this 25th day of January, 1989.

POLLUTION CONTROL HEARINGS
BOARD

/s/ Wick Dufford
WICK DUFFORD
Chairman

59a

/s/ Harold S. Zimmerman
HAROLD S. ZIMMERMAN
Member

(Dissent)
JUDITH A. BENDOR
Member

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Law Judge

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PCHB No. 86-118

PUD No. 1 OF JEFFERSON COUNTY
and CITY OF TACOMA,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES and
DEPARTMENT OF WILDLIFE,

Respondents.

REVISED DISSENTING OPINION

The Water Quality Certification issued by the Department of Ecology ("DOE") conforms to the requirements of state law to establish base flows and should be AFFIRMED. Therefore, I dissent.

— This is a simple case about what constitute adequate minimum monthly flows to preserve fish habitat in the Dosewallips River. The revised majority opinion places an insupportable reliance on a limited mathematical model, derived from only one wateryear, to determine habitat, and ignores a range of critical real-world habitat factors. Moreover, the opinion erroneously concludes that DOE's optimization of flows for *one* fish species at the spawning life stage constitutes "enhancement" of habitat for *all* fish. In light of all the evidence, the opinion effectively and improperly shifts the burden from appellants to prove that DOE's base flows are in error, onto respondent DOE to prove their base flows are correct.

In sum, the opinion is fatally flawed.

I

The Dosewallips is a river of unique beauty, with its headwaters flowing from the high glacial peaks of the eastern Olympic Mountains in the Olympic National Park. After flowing through the Park, and national forest and private lands, it empties into deep Hood Canal. The River is an important asset to the State of Washington, supporting wild and pen-reared runs of sea-run steelhead, as well as coho and chinook salmon in the upper portions, and pink and chum salmon in the lower, flatter reaches of the River. Parts of the upper River are steep, with cascades, deep plunge pools and riffles. Upstream, above the proposed project, there is an impassable waterfall preventing fish from migrating beyond. Because of the snow and glacial runoff, the River's flows fluctuate widely from month to month and from year to year.

Because the uppermost origins of the River are within the National Park, the River's water quality is significantly protected. This is a situation increasingly rare among the watersheds and waters of Washington State and specifically Hood Canal. The River is under study for possible inclusion in the Wild and Scenic Rivers List.

II

The proposed hydroelectric project consists of a diversion dam, a penstock (very large pipe), and a powerhouse. At the dam, 50 to 600 cubic feet per second ("cfs") of water from the River would be removed from a 1.2 mile stretch of the River, (between River Miles 13.8 and 12.6), in a fairly steep section known as the "bypass reach". The diverted water would flow through the penstock in a tunnel to the powerhouse where electricity would be generated.

The project does not include any storage capacity, so flows in excess of 600 cfs, the project's capacity, would

not be diverted and would remain in the River and complement any required base flows. Conversely, because of engineering constraints, when the River's flows are less than 50 cfs plus that month's required base flows, no removal of water would occur. However, at flows of 51 cfs plus base flows, all 50 cfs could be diverted, resulting in abrupt River flow changes during low flow periods.¹

The key disputed issue in this case is: what are the base flows that must be left in the River's bypass reach in order to preserve the fish?

III

DOE issued the Water Quality Certification allowing PUD No. 1 of Jefferson County and the City of Tacoma to withdraw from 50% to 90% of the River's flows, depending upon the month. By no stretch of the imagination can DOE's action, leaving in the River only 50% to 10% of the flows, be properly characterized as leaving the River in a wild state. In rebuttal, appellants propose to remove 95% of the River's flows in *all months* except September and October. (See Attachment One.)

IV

To determine what flows are required to satisfy the fish preservation base flow requirements of RCW 90.54.020(3)(a), both the DOE and appellants utilized, to varying degrees, a mathematical model known as PHABSIM (hereafter "model") in an effort to calculate fish habitat. The model is in the early developmental stages. The mathematical results were then interpreted by DOE using experts' professional judgment to derive

¹ Additional engineering constraints may limit such diversions, to avoid having to frequently turn the turbines on and off. However, no evidence has been presented further delineating such constraints.

base flow figures that preserve habitat. This total evaluation process is known as IFIM (hereafter "evaluation"). A basic assumption was made by all parties that preservation of habitat in fact preserved fish. Such assumption does not account for other non-flow related preservation factors, such as overfishing.

V

A stretch of the River within the bypass was chosen for PHABSIM modeling purposes. Only three physical variables were measured: water velocity, water level, and substrate (composition of the bottom). Only one set of river velocity speeds were measured and used in the model, rather than the customary three. The model then attempted to quantify habitat under different proposed flows, resulting in a number known as "weighted usable area" ("WUA"). These WUA numbers are intended to be *indicators* of habitat. Appellants' case consisted of only one witness, who conceded that the Dosewallips is "a very difficult stream" to model.

VI

The model has not been tested to determine its accuracy range or the magnitude of risk inherent. Moreover, the model cannot even compute habitat when flows exceed 600 cfs, which occurs regularly in the Dosewallips. In addition, for fish fry life stages, the model is very unreliable, attempting to dry-up the River.

The model did *not* include other important flow-related factors which are essential elements of habitat, including: predation, competition and territoriality, sedimentation and the effect on eggs and food supplies, the adequacy of flows to prevent eggs from dehydrating, and the creation of barriers to migration. A properly conducted determination of base flows for fish preservations must consider these other factors, even if the factors have not been

individually numerically quantified.² The model's numerical results must be cross-checked with real-life requirements. Unfortunately, the other opinion largely adopts these bare-bones numerical results "whole cloth".

VII

The Dosewallips River, as it currently flows undammed, provides excellent habitat for steelhead and salmon. The fish have evolutionarily adapted over the millenium to this River with its dynamic changes in flow. The following brief background on fish lifecycles provides a basis for understanding why different flows during the year are critical.

Sea-run steelhead enter the River in winter and early spring, spawning in the River in the spring. The eggs hatch and the fry and juveniles rear in the River for two years, whereupon they migrate downstream to rear in the ocean for about one and a half years before returning to spawn. Adult chinook salmon in the Dosewallips consist of spring and fall runs, with the former entering the River in April to June, staying in the River until they spawn in August-September. Fall run chinook enter in August through September and spawn in December. Their young stay in the River for about one year, before migrating to the ocean. Adult coho salmon enter the River as early as August to spawn, coincident with high flow events such as glacial runoff.

The eggs are laid in gravel in a minimum of six inches of water. With as little as 15 minutes exposure to air, eggs dry-out and de-water. This dehydration causes significant egg mortality.

² No party has done a quantitative baseline study for such factors. All parties concede such study would be very expensive, take many years to complete, and is not practical to do. Therefore, experts' judgments were used.

VIII

The type of habitat suitable for steelhead and salmon differs depending upon the particular life stage. Under natural conditions several life stages of fish exist in the River at the same time.

When issuing a Water Quality Certificate which allows diversion of a river's flow, given the variety of *concurrent* habitat demands, an expert determination has to be made as to *which life stage* is most flow-sensitive. That life stage is then "optimized" using the WUA habitat indicators.

All parties engaged in "optimization". DOE correctly used the spawning stages for such optimization.³ In contrast, where choices had to be made, appellants optimized for juvenile rearing.

IX

Appellants used a statistical river flow at the "50% Exceedance" level based on only one water-year, (1931-32), to derive the weighted usable area habitat indicators. Appellants erroneously concluded that such habitat indicators alone constitute "existing habitat" for purposes of base flow determination. The other opinion erroneously adopts appellants' methodology.

The 50% Exceedance ("50% E") flow is a statistical figure which the Federal Energy Regulatory Commission requires be used for hydroelectric permit applications. 50% E is also a calculation in harmony with engineering/design criteria. However, there is little credible testimony in this proceeding that the 50% E flow levels are in fact grounded in the biological habitat requirements of fish.

In addition, appellants' 50% E levels were based on 1931-32 *median* flow figures, that is: half the time in a

³ In February, when there is no spawning stage, DOE used the juvenile rearing stage.

given month in 1931-32 the flows exceeded that statistical level, and half the time they were less. In the real world, there can be a vast difference in flow levels between 50% E median flows and average (*mean*) flows, e.g., in one month 210 cfs was the median, whereas 800 cfs was the mean. In this project, appellants' base flows will reduce in-stream flows to the 95% E level; 95% of the time the in-stream flows remaining in the bypass would be less than the 1931-32 *median* flows.

X

The Washington Department of Ecology, three resource agencies—Washington State Departments of Game and of Fisheries, and the U.S. Fish and Wildlife Service—and the Indian Point No Point Treaty Council, all determined that the model-derived 50% E median flows based solely on one water-year did not sufficiently measure real-life existing habitat in the dynamic Dosewallips River. There was abundant evidence of the incorrectness of appellants' choice of solely 1931-32, one year for modeling, and their use of median figures. The other opinion's cryptic approval (at Finding of Fact XI) essentially ignores the evidence.

XI

During the evaluation stage, in addition to optimizing for the fry life stage, DOE and the other resource agencies evaluated other habitat factors in deriving the base flows.

At all life stages fish are subject to predation. When confined to less water due to lower flows, i.e., both less area and less depth, predation is likely to be enhanced and fish losses increased. Lower flows also provide less protection by decreasing the cover provided by bubbles, making the fish more visible.

With the decrease in flows, the fish are confined to smaller areas when competing for spawning territory and

for food. The abundance of a variety of food prey, including insects, is related to flow. In addition, as stream temperatures increase during the year, fish metabolism increases, as does food consumption, thereby heightening territorial conflicts resulting from lower flows.

With less flow and water velocity, water-borne sediments are deposited onto the substrate at higher rates, increasing the risk of smothering eggs and harming prey organisms. The greatest significant increase in sediment deposit occurs during intermediate flows.

At the present time, prior to diversion, there are no known barriers to fish upstream migration below or through the Dosewallips bypass reach. Decreased flows have the likely potential to create barriers by not providing sufficient water for fish to leap upstream.

Appellants' base flows rely solely on the model, and did not account for these significant habitat factors.

X [sic]

The Department of Ecology correctly exercised their responsibility to evaluate the model numbers, determined which life stage is most flow-dependent, and further evaluated real-world habitat factors in determining base flows. The Department did so in conjunction with numerous experts from several resource agencies, both state and federal. Appellants' sole witness did not prove that the Department of Ecology's base flows do more than preserve potential habitat. To the contrary, their sole witness testified that he could not conclude that the DOE base flows would enhance fish production.

Appellants have clearly not sustained their legal burden.

XI [sic]

The Water Quality Certification provides for base flows to preserve fish production potential in conformance with

68a

RCW 90.54.020(3)(a). Therefore, no maximum net benefits test need have been performed. Appellants have failed to prove that these are enhancement flows.

The Department of Ecology's base flows should be **AFFIRMED**.

DONE this 25th day of January, 1989.

/s/ Judith A. Bendor
JUDITH A. BENDOR,
Member

69a

Attachment One

| Month | Existing | DOE Base Flow | Tacoma's Proposed Base Flow |
|-------|--------------------------|------------------|--------------------------------|
| | (50% Exceedence flow) | | |
| | (CFS) | (CFS) | (CFS) |
| Jan. | 340 | 140 | 100 |
| Feb. | 302 | 100 | 75 |
| March | 325 | 200 | 145 |
| April | 408 | 200 | 130 |
| May | 689 | 200 | 105 |
| June | 738 | 200 | 105 |
| July | 448 | 200 | 90 |
| Aug. | 222 | 200 | 170 |
| Sept. | 159 | 150 | 150 |
| Oct. | 149 | 140 | 140 |
| Nov. | 285 | 140 | 95 |
| Dec. | 397 | 140 | 75* |

* Initially proposed as 65 CFS this flow was the subject of testimony at the hearing during which Tacoma stipulated to the higher flow proposal to protect egg incubation.

70a

APPENDIX F

**BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

PCHB No. 86-118

PUD No. 1 OF JEFFERSON COUNTY and
CITY OF TACOMA,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Respondent.

**ORDER DENYING SECOND MOTION FOR
SUMMARY JUDGMENT**

On November 3, 1987, appellant City of Tacoma filed its Second Motion for Summary Judgment, together with Memorandum in Support, and Supplemental Memorandum in Support with attachment (*Rock Creek Limited Partnership*).

On November 13, 1987, respondent Department of Ecology filed its Second Cross Motion for Summary Judgment and Memorandum in Support.

On November 18, 1987, City of Tacoma filed a further attachment to its Supplemental Memorandum (*Rock Creek Limited Partnership—Order Denying Rehearing*).

Having considered these together with the file herein and being fully advised, the Board finds that there is no genuine issue of material fact and that pursuant to WAC 371-08-031(2) of the Board's procedural rules and CR

71a

56, appellant's second motion for summary judgment should be denied and respondent's second cross motion for summary judgment should be granted.

In these second motions the undisputed facts are the same as in the first motions disposed of by our Order entered April 10, 1987, and our Order following request for reconsideration entered May 26, 1987.

Appellant's second motion reiterates arguments concerning state laws which were advanced previously and disposed of by prior Orders.

Appellant's second motion also advances a Declaratory Order of the Federal Energy Regulatory Commission entitled, *Rock Creek Limited Partnership Project* No. 3189-014. This holds that a water appropriation permit granted by California under state law and containing minimum flow limitations is pre-empted by the provisions of the Federal Power Act. That matter is distinguishable from this case where the issue concerns a certification provided by another federal statute (Clean Water Act, Section 401), rather than state law. Both the reasoning and conclusion of *Rock Creek* are inapposite to this appeal.

Wherefore the Board enters this

ORDER

Appellant City of Tacoma's Second Motion for Summary Judgment is denied. Respondent Department of Ecology's Second Cross Motion for Summary Judgment is granted.

DONE at Lacey, WA, this 9th day of December, 1987.

**POLLUTION CONTROL HEARINGS
BOARD**

/s/ Wick Dufford
WICK DUFFORD
Chairman

72a

/s/ Lawrence J. Faulk 12/8/87
LAWRENCE J. FAULK
Member

/s/ Judith A. Bendor
JUDITH A. BENDOR
Member

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

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APPENDIX G

STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

April 10, 1987

Mark L. Bubenik
Assistant City Attorney
City of Tacoma
Department of Public Utilities
Tacoma, Washington 98411

Jay J. Manning
Assistant Attorney General
Department of Ecology
Mail Stop: PV-11
Olympia, WA 98504

Counselors:

Re: PCHB No. 86-118
PUD #1 OF JEFFERSON COUNTY & CITY OF TA-
COMA UTILITIES DEPARTMENT V. DOE

Enclosed is the Board's "Order Granting Cross Mo-
tion for Summary Judgment."

This is a FINAL ORDER for purposes of appeal pur-
suant to WAC 371-08-220.

Very truly yours,

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

WAH:tr
Enclosure

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

No. 86-118

IN THE MATTER of a Section 401 Water Quality
Certification granted by Department of Ecology
to PUD No. 1 of Jefferson County and
City of Tacoma

PUD No. 1 OF JEFFERSON COUNTY, and
CITY OF TACOMA, DEPARTMENT OF
PUBLIC UTILITIES,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
Respondent.

ORDER GRANTING CROSS MOTION
FOR SUMMARY JUDGMENT

Having considered the following:

1. City of Tacoma's Motion for Summary Judgment filed December 12, 1987, together with Exhibits A, B and C and affidavits of Messrs. Philip Hilgert and Eugene Welch and Tacoma's Memorandum filed therewith.
2. Statement of Additional Authorities filed January 24, 1987, by the City of Tacoma.
3. State Department of Ecology's Cross Motion for Summary Judgment filed January 28, 1987, together with Memorandum and affidavits of Messrs. Brad

Caldwell, Walter Bergstrom, Kenneth J. Bruya, and Hal Beecher.

4. City of Tacoma's Memorandum in Reply to DOE's Memorandum in Opposition, filed February 4, 1987.

and having considered the file herein and being fully advised, the Board finds that there is no genuine issue of material fact and that pursuant to WAC 371-08-031(2) of the Board's procedural rules and CR 56, summary judgment should be granted.

The undisputed facts are as follows:

1. Appellants, Jefferson County Public Utility District No. 1 and the City of Tacoma, seek to develop a new hydroelectric power facility on the Dosewallips River of the Olympic Peninsula in Washington State.

2. Appellants must first obtain a federal license from the Federal Energy Regulatory Commission before proceeding to develop the hydroelectric facility.

3. Because the development requires a federal license, appellants must secure from the State of Washington a "water quality certification". The requirement to obtain such a certification is found within the federal Clean Water Act at Section 401 (codified as 33 U.S.C., Sec. 1341).

4. The appellants requested the Section 401 water quality certification from the state agency responsible for considering such requests, the Washington State Department of Ecology (DOE).

5. In making their request for Section 401 water quality certification, appellants described to DOE the nature of their proposed, new hydroelectric facility. It is not a traditional dam arrangement. Rather, it is a "run of the river" proposal in which water would be diverted from the Dosewallips and run through a long pipe ("penstock") running parallel to the river and downstream for

a little over one mile. The penstock, however, would remain at a relatively constant elevation while the river drops steeply below. The penstock, at its downstream end, then drops abruptly forcing its water through a power house from which the water then re-enters the river. Thus there would be some degree of "de-watering" within the one mile stretch of the river bypassed by the penstock.

6. The Dosewallips River supports a salmon and steel-head fishery. These fish presently inhabit the by-pass reach.

7. The Dosewallips River derives its origins in the high Peaks of the Olympic Range within the Olympic National Park. After flowing its course through wooded highlands it descends to discharge its waters to the Hood Canal. It is an important scenic asset of the State of Washington.

8. On June 11, 1986, DOE granted appellants request by issuing a Section 401 water quality certification. This contained a limitation, however, to which appellants object and which forms the basis of their appeal now before us. The limitation states:

5. A *State Water Right Permit* (Chapters 90.03.250 RCW and 508-12 WAC) must be obtained prior to commencing construction of the project. As a condition of this water quality certification, the project must comply with the stream flow requirements as set forth below:

| | | | | |
|-----------|-----|-----------|----|--------------|
| January | 140 | cfs | or | natural flow |
| February | 100 | cfs | or | natural flow |
| March | 200 | cfs | or | natural flow |
| April | 200 | cfs | or | natural flow |
| May | 200 | cfs | or | natural flow |
| June | 200 | crs [sic] | or | natural flow |
| July | 200 | cfs | or | natural flow |
| August | 200 | cfs | or | natural flow |
| September | 150 | cfs | or | natural flow |
| October | 140 | cfs | or | natural flow |
| November | 140 | cfs | or | natural flow |
| December | 140 | cfs | or | natural flow |

While these flows are in excess of those required to maintain water quality in the bypass region, they are the flows recommended by the resource agencies and tribes for maintaining sufficient flows for the fishery resource. They are included herein as a matter of cooperatin [sic] with these other agencies.

9. Appellants contend that DOE has exceeded its statutory authority in placing this limitation [sic]. The DOE contends that it has not.

From which the Board reaches the following conclusions:

1. The Section 401 water quality certification which appellants need from the state to proceed must certify that the discharge will comply with Sections 301, 302, 303, 306 and 307 of the federal Clean Water Act. These sections deal, so far as pertinent here, with what are known as "water quality standards" and the "effluent limitations" necessary to meet those standards.

2. Water quality *standards* have been promulgated by the state, with federal overview, under federal and state clean water acts. These standards are published at chapter 173-201 WAC and concern such things as fecal coliform, dissolved oxygen, dissolved gas, temperature, pH and other micro-characteristics. Similarly, effluent limitations are imposed by the permit system published at chapter 173-220 WAC and concern the same micro-characteristics.

3. In this matter, appellants assert that the base flow limitation in question is not justified by reference to water quality *standards* or effluent limitations. We do not understand DOE to take issue with this. See, for example, the affidavit of Mr. Walter Bergstrom who swears that in writing the words:

"... these flows are in excess of those required to maintain water quality in the bypass region . . ."

he meant and was referring to water temperature. Page 2, Lines 1-13. Water temperature is among the charac-

teristics for which there is a water quality standard. WAC 173-201-045(1)(c)(iv). We conclude that the base flow limitation in question is not supported by, nor intended to be supported by, water quality standards.

4. There is more, however, to Section 401, than certifying compliance with water quality standards or effluent limitations. Within subsection (d) of Section 401 it states:

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard [sic] of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(Emphasis added).

5. In interpreting the meaning of the statutory phrase "any other appropriate requirement of State law" we embrace with approval the interpretation taken by the Oregon Court of Appeals in *Arnold Irrigation District v. Department of Environmental Quality*, 79 Or. App. 136, 717 P.2d 1274 (1986) cited by the parties:

"Congress did not make the section 1313 [water quality] standards the exclusive water quality criteria which the states may use in placing limitations on section 1341 [water quality] certificates. If Congress had intended to do so, it could have specifically

mentioned those standards in section 1341(d) [quoted at conclusion 4. above], but it did not. Rather, it allowed the states to enforce *all* water quality—related statutes and rules through the states' authority to place limitations on section 1341 [401] certificates." P.1279 [Wording in brackets added]. *Emphasis in original.*

We see nothing in *Power Authority v. Department of Environmental Conservation* 379 F. Supp. 243 (1974), cited by appellant, which is at variance with the conclusion from *Arnold*, above. *Power Authority*, in language emphasized at page 6 of appellant's memorandum, merely memorializes the well known authority of states to adopt more restrictive standards than the federal Clean Water Act provides. This does not bear upon the distinction between technical water quality standards and other forms of state water quality legislation, nor the scope of Section 401(d) with regard to each. We conclude that a Section 401 water quality certificate may include limitations to enforce all state water quality—related statutes and rules including, but not limited to, water quality standards.

6. In 1971 the Legislature of the State of Washington enacted the Water Resources Act, chapter 90.54 RCW. By that Act it was established that:

"Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

(3) The *quality* of the natural environment shall be protected and, where possible, enhanced as follows:

(a) *Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which*

would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest would be served. RCW 90.54.020. *Emphasis added.*

Through enactment of this legislation [sic], the quality of state waters such as the Dosewallips River is not to be determined solely by peering into a microscope. Rather, the quality is affected when factors comprising the essential character of the river are affected, such as the route and quantity of the river's flow.

7. The provision of the Water Resources Act calling for preservation of base flows in perennial rivers of the state, RCW 90.54.020(3)(a), is a water quality—related state statute which is an “appropriate requirement of State law” under Section 401(d) of the federal Clean Water Act.

8. Base flow limitations of the kind at issue are an appropriate measure to carry out RCW 90.54.020(3)(a) of the Water Resources Act. We have previously sustained the practice of providing such base flows by regulatory orders or the permit issuing process in the context of water rights disputes. *Smith v. Department of Ecology*, PCHB No. 81-34 (1981) and *Northwest Steelhead and Salmon Council v. City of Tacoma*, PCHB No. 81-148 (1982). Base flow limitations are an equally appropriate measure to carry out the Water Resources Act in the context of a Section 401 water quality certification that will become a condition on a federal license.

9. The Department of Ecology acted within the authority conferred by Section 401(d) of the federal Clean Water Act in placing base flow limitations within its water quality certification for preservation of the fishery resource and related values.

Wherefore the Board enters this

ORDER

The appellant's Motion for Summary Judgment is denied. The Department of Ecology's Cross Motion for Summary Judgment is granted.

DONE at Lacy, Washington this 10th day of April, 1987.

POLLUTION CONTROL HEARINGS BOARD

/s/ Lawrence J. Faulk
LAWRENCE J. FAULK
Chairman

/s/ Wick Dufford
WICK DUFFORD
Member

/s/ Judith A. Bendor
JUDITH A. BENDOR
Member

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

APPENDIX H

[SEAL]

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
7272 Cleanwater Lane, LU-11
Olympia, Washington 98504-6811
(206) 753-2353

June 11, 1986

P.U.D. No. 1
Jefferson County Courthouse
Port Townsend, Washington 98368

Gentlemen:

Water Quality Certification Request

This letter is in response to your request for Water Quality Certification for the Elkhorn Hydroelectric Project (FERC No. 6002) Certification is hereby granted as required by Section 401 of the Federal Water Pollution Control Act, provided the following conditions are met:

1. A *Short-Term Modification to the Water Quality Criteria* (WAC 173-20-035) must be obtained from the Department of Ecology prior to the start of work in the waterway. This authorization is required when instream construction activities will unavoidably violate state water quality criteria (particularly turbidity) on a short-term basis. It will not be issued until the project is actually starting toward construction, evidenced by advertising for bids to construct. The application shall be submitted to the Southwest Regional Office of the Department of Ecology a minimum of 180 days before construction is scheduled to commence.

2. The request for a short-term modification shall include a plan of operation which identifies a sequence of construction events, together with provisions for mitigating water quality impacts, and a copy of the Hydraulics Project Approval secured from the Washington Departments of Fisheries and Game.
3. All construction contracts for this project shall contain specific provisions for water pollution control. The contracts shall also provide specific payment provisions for unanticipated water pollution control measures.
4. Prior to completion of the final project design, the applicant shall evaluate the future operation of the existing cleanout gate with respect to compliance with water quality standards during operation of this facility and submit a proposal which addresses the maintenance task of accumulated sediment removal.
5. A *State Water Right Permit* (Chapters 90.03.250 RCW and 508-12 WAC) must be obtained prior to commencing construction of the project. As a condition of this water quality certification, the project must comply with the stream flow requirements as set forth below:

| | | | | |
|-----------|-----|-----|----|--------------|
| January | 140 | cfs | or | natural flow |
| February | 100 | cfs | or | natural flow |
| March | 200 | cfs | or | natural flow |
| April | 200 | cfs | or | natural flow |
| May | 200 | cfs | or | natural flow |
| June | 200 | cfs | or | natural flow |
| July | 200 | cfs | or | natural flow |
| August | 200 | cfs | or | natural flow |
| September | 150 | cfs | or | natural flow |
| October | 140 | cfs | or | natural flow |
| November | 140 | cfs | or | natural flow |
| December | 140 | cfs | or | natural flow |

While these flows are in excess of those required to maintain water quality in the bypass region, they are the flows

recommend by the resource agencies and tribes for maintaining sufficient flows for the fishery resource. They are included herein as a matter of cooperation with these other agencies.

6. *Specific Construction Activity Conditions*

Care will be taken to prevent any petroleum products, paint, chemicals, or other harmful materials from entering the water.

All construction debris will be disposed of on land so it cannot enter state waters.

All lumber treated with creosote or other protective material will be completely dry before use in or near the waterway.

No wood waste or other organic material is to be used in any fill.

Only clean, durable riprap will be used.

Dredge spoils and/or excess excavated material shall be disposed of in a manner that prevents the spoils, leachates or drainage from the spoils, from entering state waters.

All sanitary wastes generated at the power plant during construction and operation shall be discharged to the sewerage system. Solid wastes generated at the power plant during construction and operation shall be disposed of in accordance with the regulations of the local health district.

Oil spill containment and cleanup equipment shall be on hand at the power plant at all times.

Failure to comply with the conditions described above may result in revocation of this water quality certification and issuance of civil penalties in accordance with the enforcement policies and guidelines of the Department of Ecology.

Sincerely,

/s/ Clark Haberman
CLARK HABERMAN
Regional Manager

CH:pw(WB4/5)

APPENDIX I

| ELKHORN HYDROELECTRIC PROJECT | | | | |
|-------------------------------|------------------------------------|--|--|--|
| Month | Median Monthly Flow (cfs) | Applicant's 7/25/85 Proposal (cfs) | Agency/Tribal 10/85 Proposal (cfs) | Applicant's 1/14/85 Proposal (cfs) |
| Jan | 340 | 65 | 140 | 100 |
| Feb | 302 | 75 | 100 | 75 |
| Mar | 325 | 75 | 200 | 145 |
| Apr | 408 | 75 | 200 | 130 |
| May | 689 | 75 | 200 | 105 |
| Jun | 738 | 75 | 200 | 105 |
| Jul | 448 | 75/85 | 200 | 90 |
| Aug | 222 | 130 | 200 | 170 |
| Sep | 159 | 125 | 150 | 150 |
| Oct | 149 | 155 | 140 | 140 |
| Nov | 285 | 75 | 140 | 95 |
| Dec | 397 | 65 | 140 | 65 |

APPENDIX J

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUD NO. 1 OF JEFFERSON)
COUNTY, and CITY OF)
TACOMA DEPARTMENT)
OF PUBLIC UTILITIES,)

Appellant,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Respondent.)

) PCHB No. 86-118

) AFFIDAVIT OF
) WALTER BERGSTROM

STATE OF WASHINGTON)
COUNTY OF THURSTON) ss.

I, Walter Bergstrom, being first duly sworn upon
oath, depose and say:

KENNETH O. EIKENBERRY, ATTORNEY GENERAL

Jay J. Manning

Assistant Attorney General

Attorney General's Office

Ecology Division, Mail Stop PV-11

Olympia, Wa. (206) 451-6158

98504

Telephone

[SEAL]

1. I am over 18 years of age and competent to testify herein.

2. I have been employed by the Department of Ecology, or one of its predecessor agencies, for 25 years. I am a water resources specialist. I have a Bachelor of Science Degree from Oregon State University in Agricultural Engineering.

3. I helped prepare the water quality certification that was issued on June 11, 1986, for the proposed Elkhorn hydroelectric project. Specifically, I wrote Condition 5, which imposes a minimum instream flow condition on the project. I wrote the language

while these flows are in excess of those required to maintain water quality in the bypass region, they are the flows recommended by the resource agencies and tribes for maintaining sufficient flows for the fishery resource.

The term "water quality" as I used it in the preceding quote refers to the temperature of the water itself. In other words, when I stated that the flows are in excess of those required to maintain water quality, I meant that the flows are more than are necessary to ensure compliance with the applicable water quality standards for temperature. WAC 173-201(1)(c)(iv). When I used the term "water quality" in Condition 5 in the water quality certification, I was not referring to the stream's biological quality, physical quality, or aesthetic quality.

4. When the City of Tacoma applies for a water right permit for the Elkhorn project, the Department of Ecology will, in my opinion, condition any water right permit for the project, if such a permit is issued, to require a minimum instream flow similar or identical to the one in the water quality certification.

/s/
WALTER BERGSTROM

SUBSCRIBED AND SWORN to before me this 28th day
of January, 1987.

/s/
NOTARY PUBLIC in and for the
State of Washington.
My commission expires. 1/16/90

APPENDIX K

[SEAL] UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 18 1991

OFFICE OF
WATER

Honorable Lois D. Cashell
Secretary
Federal Energy Regulatory Commission
825 North Capitol Street, NE
Washington, D.C. 20426

Dear Ms. Cashell:

I am writing on behalf of the Environmental Protection Agency's (EPA) Office of Water to help clarify issues regarding the application of Clean Water Act Section 401 state water quality certification to Federal Energy Regulatory Commission (FERC) licenses. This letter was precipitated by FERC documents addressing Section 401 certification; a letter of July 25, 1990, to James Elder, Director, Office of Water Enforcement and Permits, from Fred Springer of your staff; and portions of a June 5, 1990, Report of the Staff of the Federal Energy Regulatory Commission to the Water and Power Subcommittee of the U.S. Senate Energy and Natural Resources Committee.

The FERC report (page 4) asserts that state Section 401 certification conditions on FERC licenses related to "fish, wildlife, vegetation and recreation" are inappropriate. However, protection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain

the aquatic system. Relevant water quality issues include the toxicity and bioaccumulation of pollutants, the diversity and composition of the aquatic species, entrapment of pollutants in sediment, stormwater and nonpoint source impacts, habitat loss, and hydrologic changes. A State may need to address any one or combination of these factors in particular circumstances in order to meet the mandates of the Clean Water Act (CWA) articulated in Section 101(a) "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."

State water quality standards form the backbone for formulating Section 401 decisions. EPA regulations (40 CFR Part 131) implementing Section 303(c)(2)(A) of the CWA require that States adopt water quality standards having three basic components: use designations, criteria to protect those uses, and an antidegradation policy. EPA regulations direct that, where attainable, States must designate uses to meet the CWA goal in Section 101(a)(2) of water quality which "provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water." States must develop criteria designed to protect and maintain these designated water uses. States are not limited to adopting chemical-specific criteria, but are exhorted to adopt narrative and numerical criteria (40 CFR 131.11(b)). In addition, EPA's Fiscal Year 1991 Operating Guidance provides that by September 30, 1993, all States are to adopt biological criteria into their water quality standards. EPA regulations also require that States adopt antidegradation policies providing for protection of existing uses and the level of water quality necessary to maintain those uses. In the case of fill activities in wetlands, existing use requirements are met if the activity does not cause or contribute to significant degradation of the aquatic environment as defined in the guidelines developed under Section 404(b)(1) of the CWA.

In its letter, FERC expressed concern that States may be imposing conditions in hydropower licenses which go beyond EPA water quality standard requirements. As we explained above, water quality standards go well beyond chemical-specific criteria. In addition, Section 510(1) of the CWA expressly

reserves the right of States to adopt or enforce "(A) any standard of limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution" that are equal to or more stringent than Federal standards or limitations. If a State imposes conditions or denies certification beyond the bounds of its authority, such conditions or denials may be challenged through the State administrative and judicial system.¹

The FERC letter inquires about EPA's authority to limit State Section 401 decisions. As noted earlier, States have the authority to impose more stringent environmental standards. In addition, EPA's authority under Section 401 is limited. While EPA approves State water quality standards and, if necessary, promulgates Federal water quality standards, we do not have the authority to countermand State Section 401 certification decisions. The only exception is that EPA regulations (40 CFR Section 124.55(c)) provide for EPA to disregard State certification conditions or certification denials when the grounds for the decision is that State law allows a less stringent permit condition. Under Section 401(a)(1), EPA has authority to conduct Section 401 certification decisions in cases where the State does not have the authority. For example, EPA issues certifications for South Dakota and for some Indian Tribes. In addition, Section 401(a) gives EPA specific responsibilities for notification and recommendations in cases where a discharge

¹ We acknowledge some divergence in State Court decisions interpreting Section 401 certification authority. Compare In re Lava Diversion Project, 717 P.2d 1274 (Ore App. 1986) (allowing consideration of State land use planning in the State's 401 certification conditions) with Fourth Branch Associates v. Department of Environmental Conservation, 550 N.Y.S. 2d 769 (Albany Co., 1989) (limiting State certification decision to whether project will violate water quality standards). These decisions, however, were reached without any consideration of the views of EPA, the primary Federal agency responsible for implementation of the CWA. In any case, Section 401(d) of the CWA gives the States authority to place any conditions on water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, standards of performance, or pretreatment standards (Sections 301, 302, 303, 306, and 307 of the CWA) and with "any other appropriate requirements of State law."

may affect the waters of any State other than the State in which the discharge originates.

EPA has issued, and will continue to issue, guidance and technical assistance for States to use in developing water quality standards and in implementing their Section 401 programs. Guidance on implementing water quality standards is included in EPA's Water Quality Standards Handbook. Recently, EPA issued program guidance on biological criteria (April 1990), and guidance on water quality standards for wetlands (July 1990). In addition, EPA is developing sediment criteria guidance and biological effects-based testing procedures for contaminated sediments, revisions to the water quality standards regulation, and other guidance as needed. In April 1989, we issued a handbook for States on the application of Section 401 certification to wetlands. Finally, as the principal agency responsible for administering the CWA, EPA routinely communicates its interpretation of statutory provisions such as those under Section 401 to State and Federal agencies.

I hope that this letter has clarified EPA's position on the broad range of elements that States need to include in their water quality standards to protect the quality of the nation's waters, the application of these and other considerations in Section 401 certification, and EPA's role in the certification process. If you have any questions regarding this letter or wish to meet to discuss water quality issues as they relate to your agency, please call me or have your staff contact Martha Prothro, Director, Office of Water Regulations and Standards (382-5400).

Sincerely yours,

/s/

LaJuana S. Wilcher
Assistant Administrator

APPENDIX L

**Chapter 173-201 WAC
WATER QUALITY STANDARDS FOR WATERS OF
THE STATE OF WASHINGTON**

WAC

| | |
|-------------|---|
| 173-201-010 | Purpose. |
| 173-201-020 | Water use and quality criteria. |
| 173-201-025 | Definitions. |
| 173-201-030 | Repealed. |
| 173-201-035 | General considerations. |
| 173-201-040 | Repealed. |
| 173-201-045 | General water use and criteria classes. |
| 173-201-050 | Characteristic uses to be protected. |
| 173-201-060 | Repealed. |
| 173-201-070 | General classifications. |
| 173-201-080 | Specific classifications—Freshwater. |
| 173-201-085 | Specific classifications—Marine water. |
| 173-201-090 | Achievement considerations. |
| 173-201-100 | Implementation. |
| 173-201-110 | Surveillance. |
| 173-201-120 | Enforcement. |
| 173-201-130 | Repealed. |
| 173-201-140 | Miscellaneous. |

**DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS
CHAPTER**

| | |
|-------------|--|
| 173-201-030 | Water use and quality criteria—General water use and criteria classes. [Order 73-4, § 173-201-030, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035. |
| 173-201-040 | Water use and quality criteria—General considerations. [Order 73-4, § 173-201-040, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035. |
| 173-201-060 | Water course classification. [Order 73-4, § 173-201-060, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035. |
| 173-201-130 | Definitions. [Order 73-4, § 173-201-130, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035. |

WAC 173-201-010 Purpose. The purpose of this chapter is to establish water quality standards for surface waters of the state of Washington pursuant to the provisions of chapter 90.48 RCW and the policies and purposes thereof. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-010, filed 1/17/78; Order 73-4, § 173-201-010, filed 7/6/73.]

WAC 173-201-020 Water use and quality criteria. The water use and quality criteria set forth in WAC 173-201-035 through 173-201-050 are established in conformance with present and potential water uses of said surface waters and in consideration of the natural water quality potential and limitations of the same. Nonetheless, the dynamic nature of the process is also recognized. Hence, frequent review of these uses and criteria is anticipated; and revisions will be undertaken as additional information is developed. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-020, filed 1/17/78; Order 73-4, § 173-201-020, filed 7/6/73.]

WAC 173-201-025 Definitions. (1) Background Conditions: The biological, chemical, and physical conditions of a water body, upstream from the point or nonpoint source of any discharge under consideration. Background sampling location in an enforcement action would be upstream from the point of discharge, but not upstream from other inflows. If several discharges to any water body exist, and enforcement action is being taken for possible violations to the standards, background sampling would be undertaken immediately upstream from each discharge.

(2) Fecal Coliform: That portion of the coliform group which is present in the intestinal tracts and feces of warm-blooded animals as detected by the product of acid or gas from lactose in a suitable culture medium within 24 hours at 44.5 degrees plus or minus 0.2 degrees C.

(3) Mean Detention Time: The time obtained by dividing a reservoir's mean annual minimum total storage by the 30-day ten-year low-flow from the reservoir.

(4) Median Value: That value of a group of measurements that falls in the middle when the measurements are arranged in order of magnitude. If the number of measurements is even, the median value would be the value half-way between the two middle measurements.

(5) Permit: A document issued pursuant to RCW 90.48.160 et seq. or RCW 90.48.260 or both, specifying the waste treatment and control requirements and waste discharge conditions.

(6) pH: The negative logarithm of the hydrogen ion concentration.

(7) Surface Waters of the State: Include lakes, rivers,

ponds, streams, inland waters, saltwaters, and all other surface waters and water courses within the jurisdiction of the state of Washington.

(8) Temperature: Temperature expressed in degrees Celsius.

(9) Turbidity: The clarity of water expressed as nephelometric turbidity units (NTU) and measured with a calibrated turbidimeter.

(10) Upwelling: Upwelling is a direct result of wind stress on the sea surface. As winds blow parallel to a coast, the net flow of water is at an angle of about 45° toward the sea. This flow causes cold bottom water to move upward to replace the warmer surface water moving offshore. The cold water is rich in dissolved nutrients and has a low dissolved oxygen content. [Statutory Authority: RCW 90.48.035, 78-02-043 (Order DE 77-32), § 173-201-025, filed 1/17/78.]

WAC 173-201-030 Repealed. See Disposition Table at beginning of this chapter.

WAC 173-201-035 General considerations. The following general guidelines shall apply to the water quality criteria and classifications set forth in WAC 173-201-020 through 173-201-085 hereof:

(1) At the boundary between waters of different classifications, the water quality criteria for the higher classification shall prevail.

(2) In brackish waters of estuaries, where the fresh and marine water quality criteria differ within the same classification, the criteria shall be interpolated on the basis of salinity; except that the marine water quality criteria shall apply for dissolved oxygen when the salinity is one part per thousand or greater and for fecal coliform organisms when the salinity is ten parts per thousand or greater.

(3) The water quality criteria herein established shall not apply within an authorized dilution zone adjacent to or surrounding a waste-water discharge.

(4) Generally, waste discharge permits, whether issued pursuant to the National Pollutant Discharge Elimination System or otherwise, shall be conditioned in such manner as to authorize discharges which meet the water quality standards.

(a) However, persons discharging wastes in compliance with the terms and conditions of permits shall not

be subject to civil and criminal penalties on the basis that discharge violates receiving water standards.

(b) Permits shall be subject to modification by the department of ecology whenever it appears to the department the discharge violates receiving water standards. Modification of permits, as provided herein, shall be subject to review in the same manner as originally issued permits.

(5) Nonpoint Sources and Water Quality Standards.

(a) It is recognized that many activities not subject to a waste discharge permit system are now being performed in the state, which result in conflicts with the receiving water quality standards of this chapter. Further, the department has not developed a program which, in a reasonable or fully satisfactory manner, provides methods or means for meeting such standards. Persons conducting such activities shall not be subject to civil or criminal sanctions for violation of water quality standards if the activities are either:

(i) Conducted in accordance with management practices set forth by rules of the department.

For example, promulgation of regulations by the department which set forth approved management practices or other effluent limits shall be accomplished so that activities conducted within such regulations, (i.e., Forest Practices Rules and Regulations chapter 173-202 WAC and Title 222 WAC) will achieve compliance with water pollution control laws. When the regulations are violated, the water quality standard can be enforced as described in WAC 173-201-045; or,

(ii) Subject to a regulatory order issued by the department relating to specific activities as provided for in WAC 173-201-100(2).

(b) Management practices or regulatory orders described in WAC 173-201-035(5) hereof, shall be subject to modification by the department of ecology whenever it appears to the department that the discharge violates receiving water standards. Modification of management practices or regulatory orders, as provided herein, shall be subject to review in the same manner as the originally issued management practices or regulatory orders.

(6) The water quality criteria herein established for total dissolved gas shall not apply when the stream flow exceeds the 7-day, 10-year frequency flood.

(7) The total area and/or volume of a receiving water

assigned to a dilution zone shall be as described in a valid discharge permit as needed and be limited to that which will:

(a) Not cause acute mortalities of sport, food, or commercial fish and shellfish species of established biological communities within populations or important species to a degree which damages the ecosystem.

(b) Not diminish aesthetic values or other beneficial uses disproportionately.

(8) The antidegradation policy of the state of Washington, as generally guided by chapter 90.48 RCW, Water Pollution Control Act, and chapter 90.54 RCW, Water Resources Act of 1971, is stated as follows:

(a) It shall be the intent of this policy that existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

(b) No degradation will be allowed of waters lying in national parks, national recreation areas, national wildlife refuges, national scenic rivers, and other areas of national ecological importance.

(c) Whenever receiving waters of a classified area are of a higher quality than the criteria assigned for said area, the existing water quality shall be protected and waste and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except, in those instances where:

(i) It is clear that overriding considerations of the public interest will be served, and

(ii) All wastes and other materials and substances proposed for discharge into the said waters shall be provided with all known, available, and reasonable methods of treatment before discharge.

(d) Whenever the natural conditions of said waters are of a lower quality than the criteria assigned, the natural conditions shall constitute the water quality criteria.

(e) The criteria established in WAC 173-201-045 may be modified for a specific water body on a short-term basis when necessary to accommodate essential activities, respond to emergencies, or to otherwise protect the public interest. Such modification shall be issued in writing by the director or his designee subject to such terms and conditions as he may prescribe.

(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes

injurious to existing water uses and causes long-term and irreparable harm to the environment.

(g) It shall be the policy of the state of Washington that no waste discharge permit be issued which will violate established water quality criteria for the said waters, except, as provided for under WAC 173-201-035(8)(e).

(9) Due consideration will be given to the precision and accuracy of the sampling and analytical methods used as well as existing conditions at the time, in the application of the criteria.

(10) The analytical testing methods for these criteria shall be in accordance with the most recent editions of "Standard Methods for the Examination of Water and Wastewater," published by the American Public Health Association, American Water Works Association, and the Water Pollution Control Federation, and "Methods for Chemical Analysis of Water and Wastes," published by EPA, and other or superseding methods published and/or approved by the department following consultation with adjacent states and concurrence of the Environmental Protection Agency.

(11) Deleterious concentrations of radioactive materials for all classes shall be as determined by the lowest practicable concentration attainable and in no case shall exceed:

(a) 1/100 of the values listed in WAC 402-24-220 (Column 2, Table II, Appendix A, Rules and Regulations for Radiation Protection); or,

(b) The United States Environmental Protection Agency Drinking Water Regulations for radionuclides, as published in the Federal Register of July 9, 1976, or subsequent revisions thereto.

(12) Deleterious concentrations of toxic, or other non-radioactive materials, shall be determined by the department in consideration of the Quality Criteria for Water, published by EPA 1976, and as revised, as the authoritative source for criteria and/or other relevant information, if justified.

(13) Nothing in this chapter shall be interpreted to be applicable to those aspects of governmental regulation of radioactive wastes which have been preempted from state regulation by the Atomic Energy Act of 1954, as amended, as interpreted by the United States Supreme Court in the cases of Northern States Power Co. v. Minnesota 405 U.S. 1035 (1972) and Train v. Colorado Public Interest Research Group 426 U.S. 1 (1976). [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-035, filed 1/17/78.]

WAC 173-201-040 Repealed. See Disposition Table at beginning of this chapter.

WAC 173-201-045 General water use and criteria classes. The following criteria shall apply to the various classes of surface waters in the state of Washington:

(1) **CLASS AA (EXTRAORDINARY).**

(a) General Characteristic. Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses.

(b) Characteristic Uses. Characteristic uses shall include, but are not limited to, the following:

- (i) Water supply (domestic, industrial, agricultural).
- (ii) Wildlife habitat, stock watering.
- (iii) General recreation and aesthetic enjoyment (picnicking, hiking, fishing, swimming, skiing, and boating).
- (iv) General marine recreation and navigation.
- (v) Fish and shellfish reproduction, rearing, and harvesting.

(c) Water Quality Criteria.

(i) Fecal Coliform Organisms.

(A) Freshwater - Fecal coliform organisms shall not exceed a median value of 50 organisms/100 ml, with not more than 10 percent of samples exceeding 100 organisms/100 ml.

(B) Marine water - Fecal coliform organisms shall not exceed a median value of 14 organisms/100 ml, with not more than 10 percent of samples exceeding 43 organisms/100 ml.

(ii) Dissolved oxygen.

(A) Freshwater - Dissolved oxygen shall exceed 9.5 mg/l.

(B) Marine water - Dissolved oxygen shall exceed 7.0 mg/l except when the natural phenomenon of upwelling occurs, natural dissolved oxygen levels can be degraded by up to 0.2 mg/l by man-caused activities.

(iii) Total dissolved gas - the concentration of total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature - water temperatures shall not exceed 16.0° Celsius (freshwater) or 13.0° Celsius (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t=23/(T+5)$ (freshwater) or $t=8/(T-4)$ (marine water).

When natural conditions exceed 16.0° Celsius (freshwater) and 13.0° Celsius (marine water), no temperature increase will be allowed which will raise the

receiving water temperature by greater than 0.3° Celsius.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8° Celsius, and the maximum water temperature shall not exceed 16.3° Celsius (freshwater).

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) or 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.2 units.

(vi) Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste.

(2) **CLASS A (EXCELLENT).**

(a) General Characteristic. Water quality of this class shall meet or exceed the requirements for all or substantially all uses.

(b) Characteristic Uses. Characteristic uses shall include, but are not limited to, the following:

- (i) Water supply (domestic, industrial, agricultural).
- (ii) Wildlife habitat, stock watering.
- (iii) General recreation and aesthetic enjoyment (picnicking, hiking, fishing, swimming, skiing, and boating).
- (iv) Commerce and navigation.
- (v) Fish and shellfish reproduction, rearing, and harvesting.

(c) Water Quality Criteria.

(i) Fecal Coliform Organisms.

(A) Freshwater - Fecal coliform organisms shall not exceed a median value of 100 organisms/100 ml, with not more than 10 percent of samples exceeding 200 organisms/100 ml.

(B) Marine water - Fecal coliform organisms shall

not exceed a median value of 14 organisms/100 ml, with not more than 10 percent of samples exceeding 43 organisms/100 ml.

(ii) Dissolved Oxygen.

(A) Freshwater – Dissolved oxygen shall exceed 8.0 mg/l.

(B) Marine water – Dissolved oxygen shall exceed 6.0 mg/l, except when the natural phenomenon of upwelling occurs, natural dissolved oxygen levels can be degraded by up to 0.2 mg/l by man-caused activities.

(iii) Total dissolved gas – the concentration of total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature – water temperatures shall not exceed 18.0° Celsius (freshwater) or 16.0° Celsius (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t=28/(T+7)$ (freshwater) or $t=12/(T-2)$ (marine water).

When natural conditions exceed 18.0° Celsius (freshwater) and 16.0° Celsius (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8° Celsius, and the maximum water temperature shall not exceed 18.3° Celsius (freshwater).

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) or 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.5 units.

(vi) Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those of public health significance, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect any water use.

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of

natural origin, which offend the senses of sight, smell, touch, or taste.

(3) CLASS B (GOOD).

(a) General Characteristic. Water quality of this class shall meet or exceed the requirements for most uses.

(b) Characteristic Uses. Characteristic uses shall include, but are not limited to, the following:

(i) Industrial and agricultural water supply.

(ii) Fishery and wildlife habitat.

(iii) General recreation and aesthetic enjoyment (picnicking, hiking, fishing, and boating).

(iv) Stock watering.

(v) Commerce and navigation.

(vi) Shellfish reproduction and rearing, and crustacea (crabs, shrimp, etc.) harvesting.

(c) Water Quality Criteria.

(i) Fecal Coliform Organisms.

(A) Freshwater – Fecal coliform organisms shall not exceed a median value of 200 organisms/100 ml, with not more than 10 percent of samples exceeding 400 organisms/100 ml.

(B) Marine water – Fecal coliform organisms shall not exceed a median value of 100 organisms/100 ml., with not more than 10 percent of samples exceeding 200 organisms/100 ml.

(ii) Dissolved Oxygen.

(A) Freshwater – Dissolved oxygen shall exceed 6.5 mg/l or 70 percent saturation whichever is greater.

(B) Marine water – Dissolved oxygen shall exceed 5.0 mg/l or 70 percent saturation, whichever is greater, except when the natural phenomenon of upwelling occurs, natural dissolved oxygen levels can be degraded by up to 0.2 mg/l by man-caused activities.

(iii) Total dissolved gas – the concentration of total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature – water temperatures shall not exceed 21.0° Celsius (freshwater) or 19.0° Celsius (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t=34/(T+9)$ (freshwater) or $t=16/T$ (marine water).

When natural conditions exceed 21.0° Celsius (freshwater) and 19.0° Celsius (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8° Celsius, and the maximum water temperature shall not exceed 21.3° Celsius (freshwater).

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) and 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.5 units.

(vi) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those which adversely affect public health during characteristic uses, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect characteristic water uses.

(viii) Aesthetic values shall not be reduced by dissolved, suspended, floating, or submerged matter not attributed to natural causes, so as to affect water use or taint the flesh of edible species.

(4) CLASS C (FAIR).

(a) General Characteristic. Water quality of this class shall meet or exceed the requirements of selected and essential uses.

(b) Characteristic Uses. Characteristic uses shall include, but are not limited to, the following:

- (i) Cooling water.
- (ii) Commerce and navigation.
- (iii) Fish passage.
- (iv) Boating.

(c) Water Quality Criteria.

(i) Fecal Coliform Organisms: (Marine water) shall not exceed a median value of 200 organisms/100 ml, with not more than 10 percent of samples exceeding 400 organisms/100 ml.

(ii) Dissolved Oxygen.

Marine water - Dissolved oxygen shall exceed 4.0 mg/l or 50 percent saturation, whichever is greater, except when the natural phenomenon of upwelling occurs, natural dissolved oxygen levels can be degraded by up to 0.2 mg/l by man-caused activities.

(iii) Total dissolved gas - the concentration of total dissolved gas shall not exceed 110 percent saturation at any point of sample collection.

(iv) Temperature - water temperatures shall not exceed 24.0° Celsius (freshwater) or 22.0° Celsius (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t=39/(T+11)$ (freshwater) or $t=20/(T+2)$ (marine water).

When natural conditions exceed 24.0° Celsius (freshwater) and 22.0° Celsius (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

(v) pH shall be within the range of 6.5 to 9.0 (freshwater) or 6.5 to 9.0 (marine water) with a man-caused variation within a range of less than 0.5 units.

(vi) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those which adversely affect public health during characteristic uses, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect characteristic water uses.

(viii) Aesthetic values shall not be interfered with by the presence of obnoxious wastes, slimes, aquatic growths, or materials which will taint the flesh of edible species.

(5) LAKE CLASS.

(a) General Characteristic. Water quality of this class shall meet or exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses for waters of this class shall include, but are not limited to, the following:

- (i) Water supply (domestic, industrial, agricultural).
- (ii) Wildlife habitat, stock watering.
- (iii) General recreation and aesthetic enjoyment (picnicking, hiking, fishing, swimming, skiing, and boating).
- (iv) Fish and shellfish reproduction, rearing, and

harvesting.

(c) Water Quality Criteria.

(i) Fecal Coliform Organisms. (Lakes and impoundments) shall not exceed a median value of 50 organisms/100 ml, with not more than 10 percent of samples exceeding 100 organisms/100 ml.

(ii) Dissolved oxygen – no measurable decrease from natural conditions.

(iii) Total dissolved gas – the concentration of total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature – no measurable change from natural conditions.

(v) pH – no measurable change from natural conditions.

(vi) Turbidity shall not exceed 5 NTU over background conditions.

(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-045, filed 1/17/78.]

WAC 173-201-050 Characteristic uses to be protected. The following is a noninclusive list of uses to be protected by the various classifications for fresh and marine surface waters:

| USES F=Freshwater M=Marine water | WATERCOURSE CLASSIFICATION | | | | |
|--|----------------------------|----|----|----|----|
| | LAKE | AA | A | B | C |
| FISHERIES | | | | | |
| Salmonid | | | | | |
| Migration | F | FM | FM | FM | FM |
| Rearing | F | FM | FM | FM | |
| Spawning | F | F | F | | |
| Warm Water Game Fish | | | | | |
| Rearing | F | F | F | F | |
| Spawning | F | F | F | F | |
| Other Food Fish | F | FM | FM | FM | |
| Commercial Fishing | F | FM | FM | FM | |
| Shellfish | F | M | M | M | |
| WILDLIFE | F | FM | FM | FM | |
| RECREATION | | | | | |
| Water Contact | F | FM | FM | | |
| Boating and Fishing | F | FM | FM | FM | FM |
| Environmental Aesthetics | F | FM | FM | FM | FM |

WATER SUPPLY

| | | | | | |
|--|---|----|----|----|----|
| Domestic | F | F | F | | |
| Industrial | F | FM | FM | FM | FM |
| Agricultural | F | F | F | F | F |
| NAVIGATION | F | FM | FM | FM | FM |
| LOG STORAGE & RAFT- ING | F | FM | FM | FM | FM |
| HYDRO-POWER | F | F | F | F | F |

[Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-050, filed 1/17/78; Order 73-4, § 173-201-050, filed 7/6/73.]

WAC 173-201-060 Repealed. See Disposition Table at beginning of this chapter.

WAC 173-201-070 General classifications. General classifications applying to various surface water bodies not specifically classified under WAC 173-201-080 or 173-201-085 are as follows:

(1) All surface waters lying within the mountainous regions of the state assigned to national parks, national forests, and/or wilderness areas, are hereby designated Class AA or Lake Class.

(2) All lakes and their feeder streams within the state are hereby designated Lake Class and Class AA respectively, except for those feeder streams specifically designated otherwise.

(3) All reservoirs with a mean detention time of greater than 15 days are classified Lake Class.

(4) All reservoirs with a mean detention time of 15 days or less are classified the same as the river section in which they are located.

(5) All reservoirs established on preexisting lakes are classified as Lake Class.

(6) All undesignated surface waters that are tributaries to Class AA waters are designated Class AA. All other undesignated surface waters within the state are hereby designated Class A. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-070, filed 1/17/78; Order 73-4, § 173-201-070, filed 7/6/73.]

WAC 173-201-080 —Specific classifications—
Freshwater. Specific fresh surface waters of the state of Washington are classified as follows:

(1) American River from confluence with Bumping River to headwaters. Class AA

| | |
|---|----------|
| (2) Baker River. | Class AA |
| (3) Big Quilcene River and tributaries. | Class AA |
| (4) Bumping River from confluence with Naches River to headwaters. | Class AA |
| (5) Burnt Bridge Creek. | Class A |
| (6) Cascade River. | Class AA |
| (7) Cedar River from Lake Washington to Landsburg Dam. | Class A |
| (8) Cedar River from Landsburg Dam to headwaters. Special condition - no waste discharge will be permitted. | Class AA |
| (9) Chehalis River from Scammon Creek to Newaukum River. Special condition - dissolved oxygen shall exceed 5.0 mg/l or 50 percent saturation, whichever is greater, from June 1, to September 15. For the remainder of the year, the dissolved oxygen shall meet Class A criteria. | Class A |
| (10) Chehalis River from Newaukum River to Rock Creek. | Class A |
| (11) Chehalis River, from Rock Creek to headwaters. | Class AA |
| (12) Chehalis River, south fork, from mouth to headwaters. | Class A |
| (13) Chewack River from confluence with Methow River to headwaters. | Class AA |
| (14) Chiwawa River from confluence with Wenatchee River to headwaters. | Class AA |
| (15) Cispus River. | Class AA |
| (16) Clearwater River. | Class A |
| (17) Cle Elum River from confluence with Yakima River to Cle Elum Lake. | Class AA |
| (18) Cle Elum River from Cle Elum Lake to headwaters. | Class AA |
| (19) Cloquallum River from mouth to headwaters. | Class A |
| (20) Clover Creek from outlet of Lake Spanaway to inlet of Lake Steilacoom. | Class A |
| (21) Columbia River from mouth to the Washington-Oregon border (river mile 309). Special conditions - water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by | |

greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed 0.3° Celsius due to any single source or 1.1° Celsius due to all such activities combined. Dissolved oxygen shall exceed 90 percent of saturation.

(22) Columbia River from Washington-Oregon border (river mile 309) to Grand Coulee Dam (river mile 595). Special condition from Washington-Oregon border (river mile 309) to Priest Rapids Dam (river mile 397). Temperature - water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t = 34 / (T + 9)$.

(23) Columbia River from Grand Coulee Dam (river mile 595) to Canadian border (river mile 742).

(24) Colville River.

(25) Coweeman River from mouth to Mulholland Creek.

(26) Coweeman River from Mulholland Creek to headwaters.

(27) Crab Creek and tributary streams from confluence with Columbia River to headwaters.

(28) Decker Creek from mouth to headwaters.

(29) Deschutes River from mouth to headwaters.

(30) Dickey River.

(31) Dosewallips River and tributaries.

(32) Duckabush River and tributaries.

(33) Dungeness River from mouth to Canyon Creek.

(34) Dungeness River and tributaries from Canyon Creek to headwaters.

(35) Duwamish River from mouth south of a line bearing 254° true from the NW corner of berth 3, terminal No. 37 to the confluence with the Black River (Tukwila).

(36) Duwamish River upstream from the

Class A

Class A

Class AA

Class A

Class A

Class AA

Class B

Class AA

Class A

Class A

Class AA

Class AA

Class A

Class AA

Class B

confluence with the Black River to the limit of tidal influence.

(37) Elwha River and tributaries.

(38) Entiat River from Wenatchee National Forest boundary to headwaters.

(39) Grande Ronde River from mouth to Oregon border (river mile 37). Special condition – temperature – water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

(40) Grays River from Grays River Falls to headwaters.

(41) Green River (Cowlitz County) from mouth to headwaters.

(42) Green River (King County) from intersection of the river with west boundary of Sec. 27, T.21N. R.6E., to intersection of the river with west boundary of Sec. 13, T.21N., R.7E.

(43) Green River (King County) from intersection of the river with west boundary of Sec. 13, T.21N., R.7E., to headwaters. Special condition – no waste discharge will be permitted.

(44) Hamma Hamma River and tributaries.

(45) Hanaford Creek from mouth to east boundary line of Sec. 25, T.15N., R.2W. Special condition – dissolved oxygen shall exceed 6.5 mg/l or 70 percent saturation whichever is greater.

(46) Hanaford Creek from east boundary line of Sec. 25, T.15N., R.2W., to headwaters.

(47) Hoh River and tributaries from mouth to headwaters.

(48) Hoquiam River from mouth to river mile 9.

(49) Issaquah Creek from mouth to headwaters.

(50) Kalama River from lower Kalama River Falls to headwaters.

Class A

Class AA

Class AA

Class A

Class AA

Class AA

Class AA

Class AA

Class AA

Class A

Class A

Class AA

Class B

Class A

Class AA

(51) Klickitat River from Little Klickitat River to headwaters.

(52) Lake Washington Ship Canal from Lake Washington to Government Locks. Special condition – salinity shall not exceed one part per thousand (1.0 ppt) at any point or depth along a line that transects the ship canal at the University Bridge.

(53) Lewis River, east fork, from Multon Falls to headwaters.

(54) Little Wenatchee River from Lake Wenatchee to headwaters.

(55) Methow River from its confluence with the Chewack River to headwaters.

(56) Methow River from mouth to the confluence of the Chewack River.

(57) Mill Creek from confluence with Walla Walla River to 13th street bridge in Walla Walla. Special condition – dissolved oxygen concentration shall exceed 5.0 mg/l or 50 percent saturation whichever is greater.

(58) Mill creek from city of Walla Walla waterworks dam to headwaters. Special condition – no waste discharge will be permitted.

(59) Naches River from Snoqualmie National Forest boundary to headwaters.

(60) Naselle River from Naselle Falls to headwaters.

(61) Newaukum River from mouth to headwaters.

(62) Nisqually River from Alder Dam to headwaters.

(63) Nooksack River from mouth to river mile 4 (just below Ferndale).

(64) Nooksack River from confluence with Maple Creek to headwaters.

(65) Nooksack River, south fork, from Skookum Creek to headwaters.

(66) Nooksack River, middle fork.

(67) Okanogan River.

(68) Palouse River from mouth to Colfax (river mile 88, confluence with south fork).

(69) Palouse River from Colfax (river mile 88, confluence with south fork) to Idaho border (river mile 110). Special condition –

Class AA

Lake Class

Class AA

Class AA

Class AA

Class A

Class B

Class AA

Class AA

Class AA

Class A

Class AA

Class A

Class AA

Class AA

Class AA

Class A

Class B

Temperature – water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Class A

(70) Pend Oreille River from Canadian border (river mile 17) to Idaho border (river mile 86). Special condition – Temperature – water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Class A

(71) Pilchuck River from city of Snohomish waterworks dam to headwaters.

Class AA

(72) Puyallup River from mouth to river mile 1 (from mouth).

Class B

(73) Puyallup River from Kings Creek to headwaters.

Class AA

(74) Queets River from mouth to river mile 3.0.

Class AA

(75) Queets River and tributaries from river mile 3 to headwaters.

Class AA

(76) Quillayute River.

Class AA

(77) Quinault River from mouth to river mile 2.

Class AA

(78) Quinault River and tributaries from river mile 2 to headwaters.

Class AA

(79) Satsop River, east fork, from mouth to headwaters.

Class AA

(80) Satsop River, middle fork, from mouth to headwaters.

Class AA

(81) Satsop River, west fork, from mouth to headwaters.

Class AA

(82) Sauk River.

Class AA

(83) Skagit River from mouth to Burlington (river mile 17, Nookachamps Creek).

Class A

(84) Skagit River from Skiyou Slough, (river mile 26) to Canadian border (river mile 91).

Class AA

(85) Skokomish River and tributaries.

Class AA

(86) Skookumchuck River from Bloody Run Creek to headwaters.

Class AA

(87) Skykomish River from May Creek to headwaters.

Class AA

(88) Snake River from mouth to Washington-Idaho-Oregon border. Special condition – Temperature

(a) Below confluence with Clearwater River. Water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

(b) Above confluence with Clearwater River. Water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed 0.3° Celsius due to any single source or 1.1° Celsius due to all such activities combined.

Class A

(89) Snohomish River from mouth and east of longitude 122°13'40"W. upstream to latitude 47°56'30"N. (southern tip of Ebey Island). Special condition: Fecal coliform organisms shall not exceed a median value of 200, organisms/100 ml. with not more than 10 percent of samples exceeding 400 organisms/100 ml.

Class A

(90) Snohomish River upstream from latitude 47°56'30"N. (southern tip of Ebey Island) to limit of tidal influence.

Class A

(91) Snoqualmie River, middle fork, from mouth to headwaters.

Class AA

(92) Snoqualmie River, north fork, from mouth to headwaters.

Class AA

(93) Snoqualmie River, south fork, from west boundary of Twin Falls State Park to headwaters.

Class AA

- (94) Soleduck River and tributaries. Class AA
- (95) Spokane River from mouth to Idaho border (river mile 91). Special condition - Temperature - water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$. Class A
- (96) Stillaguamish River from mouth to river mile 7 (at Norman). Class A
- (97) Stillaguamish River, north fork, from mouth to Squire Creek. Class A
- (98) Stillaguamish River, north fork, from Squire Creek to headwaters. Class AA
- (99) Stillaguamish River, south fork, from Canyon Creek to the headwaters. Class AA
- (100) Stehekin River from Lake Chelan to headwaters. Class AA
- (101) Suiattle River. Class AA
- (102) Sulphur Creek. Class B
- (103) Sultan River from mouth to Chaplain Creek. Class A
- (104) Sultan River from Chaplain Creek to headwaters. Special condition - no waste discharge will be permitted. Class AA
- (105) Sumas River from Canadian border (river mile 12) to headwaters (river mile 23). Class A
- (106) Tieton River from confluence with Naches River to headwaters. Class AA
- (107) Tolt River from mouth to intersection of the river with west boundary of Sec. 31, T26N., R.9E. Class AA
- (108) Tolt River from intersection of the river with west boundary of Sec. 31, T.26N., R.9E. to headwaters. Special condition - no waste discharge will be permitted. Class AA
- (109) Touchet River from Dayton water intake structure to headwaters. Class AA
- (110) Toutle River, north fork, from Green River to headwaters. Class AA
- (111) Toutle River, south fork, from mouth to headwaters. Class AA
- (112) Tucannon River from Umatilla Na-

- tional Forest boundary to headwaters. Class AA
- (113) Twisp River from confluence with Methow River to headwaters. Class AA
- (114) Union River from Bremerton waterworks dam to headwaters. Special condition - no waste discharge will be permitted. Class AA
- (115) Walla Walla River from mouth to Lowden (river mile 15). Class B
- (116) Walla Walla River from Lowden (river mile 15) to Oregon border (river mile 40). Special condition - Temperature - water temperatures shall not exceed 20.0° Celsius due to human activities. When natural conditions exceed 20.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$. Class A
- (117) Wenatchee River from Wenatchee National Forest boundary to headwaters. Class AA
- (118) White River (Pierce-King Counties) from Mud Mountain Dam to headwaters. Class AA
- (119) White River (Chelan County) from Lake Wenatchee to headwaters. Class AA
- (120) Willapa River upstream of a line bearing 70° true through Mailboat Slough light. Class A
- (121) Wishkah River from mouth to river mile 6. Class B
- (122) Wishkah River from west fork of Wishkah River to intersection of the river with south boundary of Sec. 33, T.21N., R.8W. Class AA
- (123) Wishkah River from intersection of the river with south boundary of Sec. 33, T.21N., R.8W. to headwaters. Special condition - no waste discharge will be permitted. Class AA
- (124) Yakima River from confluence with Columbia River to Sunnyside Dam. Class B
- (125) Yakima River from Sunnyside Dam to river mile 185.6 (just below the confluence of the Cle Elum River). Special condition - Temperature - water temperatures shall not exceed 21.0° Celsius due to human activities.

When natural conditions exceed 21.0° Celsius (freshwater), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3° Celsius; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Class A

(126) Yakima River from river mile 185.6 (immediately upstream from the Cle Elum River) to headwaters.

Class AA

[Statutory Authority: RCW 90.48.035, 78-02-043 (Order DE 77-32), § 173-201-080, filed 1/17/78; Order DE 73-22, § 173-201-080, filed 11/16/73; Order 73-4, § 173-201-080, filed 7/6/73.]

WAC 173-201-085 Specific classifications—Marine water. Specific marine surface waters of the state of Washington are classified as follows:

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| (1) Bellingham Bay east of a line bearing 185° true from entrance of boat basin (light No. 2), except as otherwise noted. | Class B |
| (2) Bellingham Bay, inner, easterly of a line bearing 142° true through fixed green navigation light at southeast end of dock (approximately 300 yards northeast of bell buoy "2") to the east boat basin jetty. | Class B |
| (3) Budd Inlet south of latitude 47°04'N. (south of Priest Point Park). | Class B |
| (4) Coastal waters Pacific Ocean from Ilwaco to Cape Flattery. | Class AA |
| (5) Commencement Bay from south and east of a line bearing 258° true from "Brown's point" and north and west of line bearing 225° true through the Hylebos waterway light. | Class A |

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|--|---------|
| (6) Commencement Bay, inner, from south and east of a line bearing 225° true through Hylebos Waterway light except the city waterway south and east of south 11th Street. | Class B |
| (7) Commencement Bay, city waterway south and east of south 11th Street. | Class C |
| (8) Drayton Harbor, south of entrance. | Class A |
| (9) Dyes and Sinclair Inlets west of longitude 122°37'W. | Class A |
| (10) Elliott Bay east of a line between Pier 91 and Duwamish head. | Class A |
| (11) Everett Harbor east of longitude 122°13'40"W. and southwest of a line bearing 121° true from light "4" (Snohomish River mouth). | Class A |
| (12) Everett Harbor, inner, north and east of a line bearing 121° true from light "4" (Snohomish River mouth). | Class B |
| (13) Grays Harbor west of longitude 123°59'W. | Class A |
| (14) Grays Harbor east of longitude 123°59'W. to longitude 123°45'45"W. (Cosmopolis). Special condition - dissolved oxygen - shall exceed 5.0 mg/l or 60 percent saturation, whichever is greater. | Class B |
| (15) Guemes Channel, Padilla, Samish and Bellingham Bays east of longitude 122°39'W. and north of latitude 48°27'20"N., except as otherwise noted. | Class A |

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|---|----------|
| (16) Hood Canal. | Class AA |
| (17) Mukilteo and all North Puget Sound West of longitude 122°39' W. (Whidbey, Fidalgo, Guemes and Lummi Island), except as otherwise noted. | Class AA |
| (18) Oakland Bay west of longitude 123°05'W. (inner Shelton harbor). | Class B |
| (19) Port Angeles south and west of a line bearing 152° true from buoy "2" at the tip of Ediz Hook. | Class A |
| (20) Port Gamble south of latitude 47°51'20"N. | Class A |
| (21) Port Townsend west of a line between Point Hudson and Kala point. | Class A |
| (22) Possession Sound, south of latitude 47°57'N. | Class AA |
| (23) Possession Sound, Port Susan, Saratoga Passage, and Skagit Bay east of Whidbey Island and longitude 122°38'35"W. (bridge) between latitude 47°57'N. (Mukilteo) and latitude 48°27'20"N. (Similk Bay), except as otherwise noted. | Class A |
| (24) Puget Sound through Admiralty Inlet and South Puget Sound, south and west to longitude 122°52'30"W. (Brisco Point) and longitude 122°51'W. (northern tip of Hartstene Island). | Class AA |
| (25) Sequim Bay southward of entrance. | Class AA |
| (26) South Puget Sound west of longitude 122°52'30"W. | Class A |

(Brisco Point) and longitude 122°51'W. (northern tip of Hartstene Island, except as otherwise noted).

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| (27) Strait of Juan de Fuca. | Class AA |
| (28) Willapa Bay seaward of a line bearing 70° true through Mailboat Slough light. | Class A |

[Statutory Authority: RCW 90-48-035. 78-02-043 (Order DE 77-32), § 173-201-085, filed 1/17/78.]

WAC 173-201-090 Achievement considerations. To fully achieve and maintain the foregoing water quality in the state of Washington, it is the intent of the department of ecology to apply the various implementation and enforcement authorities at its disposal, including the development and implementation of the continuing planning process required by the Federal Water Pollution Control Act Amendments of 1972, (P.L. 92-500) and applicable federal regulations thereunder. It is also the intent that cognizance will be taken of the need for information as contemplated under section 304, 208, 209, and other sections of the federal act, with emphasis on silviculture and agriculture, and for participation in cooperative programs with other state agencies and private groups with respect to the management of related problems. The Washington department of ecology's planned program for water pollution control will be defined and revised annually in accordance with section 106 of said federal act and regulations. Further, it shall be required that all activities which discharge wastes into waters within the state, or otherwise adversely affect the quality of said waters, be in compliance with the waste treatment and discharge provisions of state or federal law. [Statutory Authority: RCW 90-48-035. 78-02-043 (Order DE 77-32), § 173-201-090, filed 1/17/78; Order 73-4, § 173-201-090, filed 7/6/73.]

WAC 173-201-100 Implementation. (1) Discharges from municipal, commercial, and industrial operations. The primary means to be used for controlling municipal, commercial, and industrial waste discharges shall be through the issuance of waste disposal permits, as provided for in RCW 90.48.160 and following.

(2) **Miscellaneous Waste Discharge or Water Quality Effect Sources.** The director shall, through the issuance of regulatory permits, directives, and orders, as are appropriate, control miscellaneous waste discharges and water quality effect sources not covered by WAC 173-201-100(1) hereof. It is noted that, from time to time, certain short-term activities which are deemed necessary to accommodate essential activities or to otherwise protect the public interest may be specially authorized by the director as indicated in WAC 173-201-035(8)(e), under such conditions as the director may prescribe, even though such activities may result in a reduction of water quality conditions below those criteria and classifications established by this regulation. [Statutory Authority: RCW 90-48-035, 78-02-043 (Order DE 77-32), § 173-201-100, filed 1/17/78; Order 73-4, § 173-201-100, filed 7/6/73.]

WAC 173-201-110 Surveillance. A continuing surveillance program, to ascertain whether the regulations, waste disposal permits, orders, and directives promulgated and/or issued by the department are being complied with, will be conducted by the department staff as follows:

- (1) Inspecting treatment and control facilities.
- (2) Monitoring and reporting waste discharge characteristics.
- (3) Monitoring receiving water quality. [Statutory Authority: RCW 90.48.035, 78-02-043 (Order DE 77-32), § 173-201-110, filed 1/17/78; Order 73-4, § 173-201-110, filed 7/6/73.]

WAC 173-201-120 Enforcement. To insure that the provisions of chapter 90.48 RCW, the standards for water quality promulgated herein, the terms of waste disposal permits, and other orders and directives of the department are fully complied with, the following enforcement tools will be relied upon by the department, in cooperation with the attorney general as it deems appropriate:

- (1) Issuance of notices of violation and regulatory orders as provided for in RCW 90.48.120. Under this section, whenever in the opinion of the department a person is violating or about to violate chapter 90.48 RCW, the department shall notify said person of its determination.

Within thirty days said person shall notify the department of the action taken or being taken in response to the department's determination, whereupon the department may issue a regulatory order as it deems appropriate. Whenever the department deems immediate action is necessary to accomplish the purposes of chapter 90.48 RCW, it may issue a regulatory order without first giving notice and thirty days for response.

(2) Initiation of actions requesting injunctive or other appropriate relief in the various courts of the state, as provided for in RCW 90.48.037.

(3) Levying of civil penalties as provided for in RCW 90.48.144. Under this section, the director of the department may levy a civil penalty up to five thousand dollars per day against a person who violates the terms of a waste discharge permit, or who discharges without such a permit when the same is required, or violates the provisions of RCW 90.48.080. If the amount of the penalty, which is subject to mitigation or remission by the department, is not paid within thirty days after receipt of said notice, the attorney general, upon request of the director, shall bring an action in superior court to recover the same.

(4) Initiation of a criminal proceeding by the appropriate county prosecutor, as provided for in RCW 90.48.140.

(5) Issuance of regulatory orders or directives as provided for in RCW 90.48.240. [Statutory Authority: RCW 90.48.035, 78-02-043 (Order DE 77-32), § 173-201-120, filed 1/17/78; Order 73-4, § 173-201-120, filed 7/6/73.]

WAC 173-201-130 Repealed. See Disposition Table at beginning of this chapter.

WAC 173-201-140 Miscellaneous. (1) The water quality criteria adopted in this chapter shall be the sole criteria for the various surface waters in the state of Washington.

(2) The criteria, classifications, and achievement considerations established by this chapter shall be reviewed from time to time by the department to insure that the quality of the waters of the state may be enhanced wherever possible through appropriate modifications of this chapter.

(3) These rules contemplate and it is the specific intent of the department of ecology to continue to evaluate the watercourse classifications under WAC 173-201-070 through 173-201-085 hereof, with special emphasis placed on those waters constituting reaches of streams in nonurban areas, and, if deemed appropriate, initiate rule-making proceedings as to any needed changes in classification. Additionally, the department shall, in light of concerns expressed both for high water quality and for the carrying on of activities on land which have an effect on certain water reaches, continue with expedition to examine all waters of the state, the needs for the protection of the same and related concerns, and if, after such evaluation, it appears appropriate, initiate rule-making procedures to modify this chapter.

The department of ecology has the obligation to review the state water quality standards at least once each three year period. [Statutory Authority: RCW 90.48-.035. 78-02-043 (Order DE 77-32), § 173-201-140, filed 1/17/78; Order 73-4, § 173-201-140, filed 7/6/73.]

APPENDIX M

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable water at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under section 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of

such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such

compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been

obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or

permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

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No. 92-1911

FILED
AUG 27 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

PUD No. 1 of JEFFERSON COUNTY
AND THE CITY OF TACOMA,
Petitioners,
v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Washington

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August 27, 1993

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

 No. 92-1911

 PUD No. 1 OF JEFFERSON COUNTY
 AND THE CITY OF TACOMA,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
 DEPARTMENT OF FISHERIES AND
 DEPARTMENT OF WILDLIFE

 On Petition for a Writ of Certiorari to the
 Supreme Court of the State of Washington

REPLY BRIEF FOR PETITIONERS

 The Brief in Opposition filed by the Attorney General of the State of Washington for respondents ("Washington") confirms the urgent need for this Court's review of the judgment of the Supreme Court of the State of Washington.

Washington claims that the judgment rests on independent state grounds that raise no issue of federal law (Opp. 10). In fact, however, the judgment of the Washington Supreme Court rests solely on its view that the

state-imposed flow levels it sustains are authorized under § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341. The very passage from the court's decision which Washington cites to support its "independent state ground" argument (Opp. 10-11), plainly shows that the Washington Supreme Court was relying on its construction of the scope of § 401 to support application of the state's water quality standards.

Further, as the Washington Supreme Court pointed out:

[F]ederal involvement in the development of state water quality standards is extensive. Those standards are required under the Clean Water Act, 33 U.S.C. § 1313. The Act requires states to devise the standards in accordance with federal regulations and to submit them to the EPA for approval. 33 U.S.C. § 1313. After the EPA approves the state's submitted standards, they become the water quality standards for the state. 33 U.S.C. § 1313(c)(3). Washington's water quality standards, in particular, have been duly adopted by the state and approved by the EPA. 50 Fed. Reg. 29,761 (1983) (noting EPA's approval of Washington's water quality standards). If a state fails to submit standards to the EPA, or if the standards it does submit are inconsistent with the Act, the EPA promulgates its own standards for the state. 33 U.S.C. § 1313(c)(4); see also 56 Fed. Reg. 58,477 (Nov. 19, 1991) (to be codified at 40 C.F.R. pt. 131) (proposed rule-making by EPA to bring Washington's water quality standards into compliance with section 303(c)(2) (B) of the Act). This statutory framework gives water quality standards a hybrid character: they have the character of state laws insofar as the states initially promulgate them, but they have a federal character insofar as the EPA regulates their content and must formally approve them before they actually become the state's water quality standards. Indeed, in *Arkansas v. Oklahoma*, 503 U.S. —, 117 L. Ed. 2d 239, 257, 112 S. Ct. 1046 (1992), the Court

declared that state water quality standards "are part of the federal law of water pollution control" at least insofar as they affect issuance of permits in other states.

(Pet. App. 15a). A state court's affirmance of a state agency's imposition of a condition in a § 401 certificate presents an issue of federal law. *Cf. Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1059 (1992). Washington itself admits that "[t]he full scope of authority provided to states by § 401 is an issue of federal law, requiring, as it does, interpretation of the CWA" (Opp. 13).¹ It is that issue, and the issue of the relation of § 401 to the FPA's licensing process, which are of vital concern to the vast hydroelectric network in the Pacific Northwest,² and to the nation's hydroelectric industry.³

Washington ultimately confronts the real issues in this case by addressing the Washington Supreme Court's rulings that (1) the minimum flow condition "is appropriate because it is necessary to ensure compliance with an 'other appropriate requirement of state law' under § 401 (d)" (Opp. 19, 20-23); and (2) upholding the flow con-

¹ If the judgment rested on *state* water quality standards independent of those authorized under § 401, they would be preempted under this Court's decisions in *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946), and *California v. FPC*, 495 U.S. 490 (1990). Washington's contention that it may impose flow levels on hydroelectric projects subject to licensing under the Federal Power Act ("FPA") under state law—independently of authority delegated by the CWA—would conflict directly with these decisions. See *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451, 455-6 (9th Cir. 1993).

² See Brief of Pacific Northwest Utilities, and Brief of Northwest Hydroelectric Association, as amici curiae in support of the petitioners.

³ See Brief of Amici Curiae American Forest and Paper Association, American Public Power Association, Edison Electric Institute, and National Hydropower Association in Support of Petition for a Writ of Certiorari.

dition is consistent with the FPA's licensing scheme (Opp. 24-27). Both of these rulings merit this Court's review. Whether a state-imposed minimum flow requirement is an "other appropriate requirement of State law" under § 401(d) is of critical importance to the relicensing of hundreds of hydroelectric projects now underway at the Federal Energy Regulatory Commission ("FERC") under the FPA, as well as to the future development of hydroelectric facilities like Tacoma's proposed Elkhorn Project. As this Court has said in an analogous context: "[t]o require the industry to proceed without knowing whether the [state regulation] is valid would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens [of the affected state]." *Pacific Gas & Elec. Co. v. State Energy Resources Cons. and Dev. Comm'n*, 461 U.S. 190, 201-202 (1983). That observation succinctly explains the need for the Court's review in this case.

The question to be asked concerning the "other appropriate requirement of State law" clause in § 401(d) is, putting it concisely: "appropriate" to what? Tacoma and the supporting amici demonstrate that an "other appropriate requirement of State law" on which § 401 certificates may be conditioned under § 401(d) must be appropriate to the regulation of activities "which may result in any discharge into the navigable waters" within the meaning of § 401(a). Diversion of water for hydroelectric generation is not a "discharge," nor is maintaining a minimum level of streamflow for fishery habitat. Therefore, state laws regulating such diversions and flows are not "appropriate" within the meaning of § 401.

Washington's concept of an "appropriate" requirement of state law disregards the relationship between § 401(a) and § 401(d). Its view, adopted by the Washington Supreme Court, that any state-imposed requirement related to the *use of water* is appropriate, permits unlimited intrusion by the states into the FPA's licensing process.

This holding is wrong because it is not properly restricted to discharges under § 401(a), and to water quality criteria under § 303(c)(2)(A) of the CWA,⁴ which are incorporated into § 401(d) and regulate such discharges.

Under Part I of the FPA, the FERC must comprehensively evaluate proposals for original and renewed hydroelectric licenses from the standpoint of national and regional as well as local considerations, taking into account impacts on the entire waterway, and giving consideration to a wide range of environmental, ecological, economic and electric power needs. State legislatures focus on the preservation of water resources for the benefit of the State alone, and state departments of ecology, fisheries, and wildlife typically represent an even narrower range of interests. There is no hint in the text or history of CWA § 401 that, in authorizing States to condition water quality certificates so as to maintain federally approved water quality standards, Congress intended to confer authority on the States to prescribe fish and wildlife conditions not based on the regulation of discharges that may pollute or degrade navigable waters. "There would be no point in Congress requiring the federal agency to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." *Sayles Hydro Assocs. v. Maughan*, 985 F.2d at 456.

The urgency of a decision by this Court as to the scope of state authority under § 401(d) is highlighted by a recent decision of the Supreme Court of Connecticut holding that, under that State's version of the Uniform Administrative Procedure Act, no judicial review is available of a decision by environmental officials denying a § 401 certificate on the grounds that a project would in-

⁴ State water quality standards under § 303(c)(2)(A), 33 U.S.C. 1313(c)(2)(A) (1988), consist of the *designated uses* of the navigable waters involved and the water quality *criteria* necessary to achieve those uses.

terfere with recreational use, fish and wildlife and the aesthetic quality of the river.⁵ It is also well established that neither FERC⁶ nor the federal courts⁷ may review state decisions denying or conditioning § 401 certificates. Therefore, guidance from this Court is urgently needed by state agencies administering the § 401 certificate program, as well as by the industry, in order to achieve consistency in the administration of the CWA and the FPA.

Finally, Washington's Brief in Opposition is permeated with overstated characterizations of the impact the Elkhorn Project will have on the fish population in the Project's bypass reach (Opp. 7, 19). For example, Washington asserts that without the state-imposed minimum flows, "one section of the Dosewallips River will be lost as habitat for salmon and Steelhead" (Opp. 7)—a finding never made by any tribunal, and a contention wholly inconsistent with the minimum flow plan recommended by Tacoma.⁸ The question presented by Tacoma's petition, however, is not what minimum flow level is appropriate, but whether that level should be determined by local ad-

⁵ *Summit Hydropower Partnership v. Commissioner of Env'tl. Protection*, Nos. 14618 and 14619 (Conn. Aug. 3, 1993) (to be reported at 226 Conn. 792) (motion for reconsideration and reargument en banc filed Aug. 13, 1993). Cf. *Triska v. Department of Health and Env'tl. Control*, 355 S.E.2d 531 (1987).

⁶ *Town of Summerville*, 60 FERC ¶ 61,291 at 61,990 (1992), reh'g denied, 63 FERC ¶ 61,037 (1993); *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172 (1990).

⁷ *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3d Cir. 1988).

⁸ Similarly, no tribunal adopted the *post hoc* affidavit (Opp. 8 n.10), that attempted to rewrite the admission in the Department of Ecology's § 401 certificate that the instream flow condition was "in excess of those required to maintain water quality in the bypass region" (Pet. App. 83a).

ministrative officials focused solely on current state policy, or by the FERC under its charge comprehensively to balance all interests.

CONCLUSION

For the reasons stated in the petition for a writ of certiorari, the briefs of the supporting amici, and this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 27, 1993

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3
FILED
AUG 06 1993

OFFICE OF THE CLERK

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On Petition for a Writ of Certiorari to the
Supreme Court of the State of Washington

BRIEF OF AMICUS CURIAE
NORTHWEST HYDROELECTRIC ASSOCIATION
IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does § 401 of the Clean Water Act grant the states authority to condition a water quality certificate for a hydroelectric project on minimum flows to protect fish habitat in excess of the flows necessary to meet adopted water quality standards.

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**BRIEF OF AMICUS CURIAE
NORTHWEST HYDROELECTRIC ASSOCIATION
IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE

THE AMICUS

The Northwest Hydroelectric Association (NWAHA) submits this brief Amicus Curiae. NWAHA is the trade association of the Pacific Northwest hydroelectric industry. Its members include publicly owned and investor owned utilities, municipalities and independent power producers located in Idaho, Montana, Northern California, Oregon and Washington.

SUMMARY OF THE ARGUMENT

In its order granting Tacoma's water quality certification request, the Washington Department of Ecology imposed minimum flow requirements based on its purported authority under § 401(d)¹ of the Clean Water Act to condition water quality certificates on the water quality factors specified in § 401(d) and "any other appropriate requirement of state law." This order conflicts with the FERC's exclusive authority to regulate hydroelectric projects.

The Washington Supreme Court upheld the conditions imposed by the Washington Department of Ecology in the Tacoma license. The Court's decision incorrectly concludes that § 401 grants the State of Washington the authority to impose minimum stream flow conditions to protect fish habitat. The Washington Supreme Court's decision contradicts the express provisions of the Clean Water Act, the balance of authority in the federal licensing scheme created by Congress and this Court's opinions interpreting that licensing scheme.

The Washington Supreme Court's opinion will cause disruption in the FERC licensing process. If allowed to stand, the opinion will permit an unauthorized state veto power by imposing minimum flow standards which render the projects uneconomical. Further, the opinion contributes to the uncertainty surrounding the definition of the scope of state authority under § 401 of the Clean Water Act.

FERC refuses to review the validity of water quality certifications issued pursuant to § 401 of the Clean Water Act, and licensees therefore cannot expect clarification from any federal agency. In the absence of direction from the United States Supreme Court, the scope of state authority to condition a § 401 certification will remain in

¹ The Clean Water Act is codified at 33 U.S.C. § 1251 *et seq.*, (1988).

question. This case presents an issue of national importance to the hydropower industry in the Pacific Northwest.

ARGUMENT

I. THIS CASE PRESENTS AN ISSUE OF REGIONAL IMPORTANCE TO THE PACIFIC NORTHWEST HYDROPOWER INDUSTRY.

A. The Pacific Northwest Hydropower Industry.

The Northwest Hydroelectric Association membership represents numerous entities that have a significant interest in this petition for certification.² The Pacific Northwest is a largely hydrobased system. Hydropower generates two-thirds of the region's energy and makes up three quarters of the region's generating capacity. The hydropower industry provides more of the region's electricity than all other sources of power combined.

Hydropower will continue to develop and remain the primary regional source of electricity. The Northwest Conservation and Power Planning Counsel 1991 plan calls for continued development of hydropower in the Northwest. Indeed, the region's new hydropower potential is substantial. The highest potential for new hydropower projects in the Pacific Northwest is approximately 2,300 megawatts of hydropower capacity, which produces 1,100 megawatts of average energy and 900 megawatts of firm energy at 13.4 cents per kilowatt-hour.³

Other factors assure hydropower's continuing importance to the Northwest. The low operating and maintenance costs of hydroelectric power projects cause hydropower to be among the lowest cost sources of electricity

² See the membership list in the attached Appendix.

³ Northwest Power Planning Council, *1991 Northwest Conservation and Electric Power Plan*, "Generating Resources," Volume II, Part II (1991).

in the country.⁴ From an environmental perspective, hydroelectric generation is a clean, renewable source of energy. Additionally, hydroelectric projects accomplish more than simply the production of electricity. Such projects provide recreational opportunities to visitors and benefits to fish and wildlife. Some projects enhance flood control, navigation, irrigation and domestic water supplies in addition to their primary purpose of generating power. As a result of these benefits, hydropower has become an integral part of a majority of the Northwest's communities, businesses and industries. In order to maintain the viability of hydropower as the traditional major resource for electrical energy in the Pacific Northwest, it is essential that the FERC licensing process be definitive and comprehensive.

B. The Hydropower Industry Will Be Significantly Affected If States Are Able To Impose Minimum Flow Conditions For Fish Habitat.

If states are allowed to mandate minimum flows for non-water quality conditions, such as fish habitat, despite the balancing assessments made by FERC, the effect on the hydroelectric industry will be severe. An increase in minimum flows at a hydroelectric project results in the release of stored water at a time when it is uneconomical to produce energy. With respect to run-of-river projects (i.e. those with no water storage capability), the increased minimum flows result in a loss of water for power generation. A special attribute of hydropower is the ability to generate at the moment when power is needed. This ability is lost when water is released from storage before peak demand periods. To replace that lost generation, electric suppliers rely on more costly forms of production. Combustion turbines, which produce air emissions, are the most common alternate energy source.

⁴ National Hydropower Association, *Hydroguide: Hydroelectric Resources of the United States*, "Introduction" (NHA, Washington, D.C. 1989).

FERC's job is to balance these competing values. FERC's decision is final and must be so if developers are to have the certainty needed for financing. Section 401 is not about balancing, but applying approved standards to protect water uses from pollution.

1. A recognition of state authority to set minimum flows for non-water quality conditions will disrupt the FERC licensing process.

State exercise of undelegated authority under the guise of the Clean Water Act will disrupt the FERC licensing process. If states can set minimum flows for fish habitat and other non-water quality conditions, disputes over § 401 conditions will result in substantial delays in the licensing process. Such delays will increase costs and create an uncertain regulatory environment.

A recent Ninth Circuit case involved a hydro licensee that had been refused a hearing on its state water rights application. The licensee was not willing to undertake additional studies regarding concerns which had already been addressed by FERC. Following this Court's decisions in *California v. FERC*, 495 U.S. 490 (1990), and *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), the Ninth Circuit stated:

The hardship is the process itself. Process costs money. If a federal licensee must spend years attempting to satisfy an elaborate, shifting array of state procedural requirements, then he must borrow a fortune to pay lawyers, economists, accountants, archaeologists, historians, engineers, recreational consultants, environmental consultants, biologists and others, with no revenue, no near-term prospect of revenue, and no certainty that there ever will be revenue. Meanwhile, politics, laws, interest rates, construction costs, and costs of alternatives change.

Sayles Hydro Ass'n v. Maughan, 985 F.2d 451, 453 (9th Cir. 1993). State imposed non-water quality standards

will present the procedural consequences that the Ninth Circuit envisioned.

2. State imposed non-water quality conditions result in unauthorized veto power.

A state's power to impose non-water quality conditions such as minimum flows for fish habitat is equivalent to a veto power. For example, in the instant case, the state imposed conditions make the proposed hydroelectric power project economically unjustifiable. As a result, FERC would be unable to license the Project under the comprehensive development standard of § 10(a) of the Federal Power Act. In light of the significant policy considerations inherent in the Federal Power Act, it is improper to give state water resource agencies such veto authority. The costs required to meet the state conditions are much greater than the expense of meeting the FERC conditions. The state imposed conditions could result in a veto of a proposed project.

Indeed, this court has recently recognized that permitting the states to exercise veto authority over non-federal hydroelectric development improperly disturbs the Commission's comprehensive regulatory authority. In *California v. FERC*, 495 U.S. 490 (1990), this Court reaffirmed that the Federal Power Act preempts state authority to set minimum flow requirements for Commission licensed hydroelectric projects. The Court reasoned that "allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would constitute a veto of the project that was approved and licensed by FERC." *Id.* at 506-7. In the face of *California v. FERC*, we now see the State of Washington trying to reach the same result via § 401 of the Clean Water Act. The principle against a state imposed veto remains the same.

II. UNLESS ADDRESSED BY THIS COURT THE WASHINGTON SUPREME COURT'S DECISION CREATES UNCERTAINTY AS TO THE STATE AUTHORITY GRANTED UNDER § 401 OF THE CLEAN WATER ACT AND WILL DISRUPT THE HYDROELECTRIC LICENSING PROCESS.

A. The Washington Supreme Court's Decision Misinterprets State Authority Under § 401 Of The Clean Water Act.

According to the Washington Supreme Court's interpretation of § 401(d), a state may impose any condition on a license as long as the condition is water quality related. By this definition, the Washington Department of Ecology has authority to take actions, such as specifying minimum stream flows to protect fish habitat, which directly conflict with the authority granted FERC under the Federal Power Act.

Congress did not intend for § 401(d) to have such expansive application. Rather, in allowing states to condition water quality certificates pursuant to § 401(d), Congress provided the states with specific authority to establish water quality standards designed to protect particular identified beneficial uses from discharges or other activities which add pollutants or degrade the receiving waters. In contrast, FERC is charged with balancing all competing interests in deciding whether a project is in the public interest. *California v. FERC*, 495 U.S. 490 (1990).

The Supreme Court of Washington's interpretation of § 401(d) greatly exceeds the narrow state role prescribed by Congress and consequently disturbs the balance of authority which Congress established in its federal licensing scheme.

1. The Washington Supreme Court's Opinion Fails to Recognize FERC's Exclusive Authority.

This Court has recognized a pervasive federal hydroelectric licensing scheme which preempts conflicting state action. In *First Iowa Hydro-Elec. Coop. v. Federal Power*

Comm'n, 328 U.S. 152 (1946), the Court rejected the State of Iowa's efforts to impose a state permitting requirement on a licensee which was attempting to obtain a hydroelectric license from the Federal Power Commission. The Court concluded that allowing the state to impose a permitting requirement would in effect grant the state veto power over the license and thereby subvert Congress' intention to concentrate comprehensive hydropower planning authority in the FPC. *First Iowa*, 328 U.S. at 164.

In *California v. FERC*, 495 U.S. 490 (1990), the Court considered the State of California's authority to impose minimum flow requirements to protect fisheries. California argued that § 27 of the Federal Power Act, which reserves certain authority regarding proprietary water rights to the states, provided the state with authority to impose mandatory flow requirements on a licensee. The Court rejected this argument and unanimously held that the flow requirements mandated by California were preempted by the federal licensing scheme. In making this determination, the Court specifically recognized that the addition of § 10(j) to the FPA reaffirmed "*First Iowa's* understanding that the FPA establishes a broad and paramount regulatory role" in the area of fish and wildlife license conditions. See *California v. FERC*, 495 U.S. at 499.

Pursuant to § 10(j) of the FPA, FERC is required to include fish and wildlife conditions in hydroelectric licenses based mainly on the recommendations of state fish and wildlife agencies. While § 10(j) requires FERC to give the recommendations of state fish and wildlife agencies special deference in establishing fish and wildlife conditions in the license, FERC possesses the authority to reject the states' recommendations when it finds that such recommendations are inconsistent with the purposes and requirements of Part I of the Federal Power Act. 16 U.S.C. § 803(j)(2). Under the Washington opinion, the state can engage in regulatory activity that is outside its

narrow authority. § 401 does not allow states to define non-water quality minimum flow requirements.

2. The Washington Department of Ecology Exceeded Narrow Authority to Limit Discharge of Pollutants.

In 1973 the Clean Water Act granted the states narrow authority for the purpose of regulating the discharge of pollutants into the Nation's waters.⁵ In the Clean Water Act, Congress empowered the Environmental Protection Agency ("EPA") with authority to limit the discharge of pollutants through a permitting process and by developing water quality standards which are applied to determine the specified levels of discharge in the permit.

Pursuant to the Clean Water Act, states can assume responsibility for developing these water quality standards subject to the approval of EPA. Specifically, § 401 grants states the circumscribed authority to certify that applicants for a federal license comply with the state's criteria concerning the discharge of pollutants developed as part of the state's water quality standards. The Clean Water Act further provides that the state may condition water quality certificates on the effluent limitations, water quality standards and monitoring provisions specified in § 401(d), as well as other appropriate requirements of state law.

The Washington Department of Ecology exceeded its authority under the Clean Water Act by imposing stream flow conditions for fisheries. Water quality standards concern the discharge of pollutants. Specifically, Washington's published water quality standards pertain to such things as fecal coliform, dissolved oxygen, dissolved gases,

⁵ The term "pollutant" is defined as specific materials including, among other things, dredged soil, solid waste, chemical wastes, biological materials and radioactive materials. 33 U.S.C. § 1362(6). Pursuant to the Act, the discharge of a pollutant "is any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

and other micro characteristics. The State of Washington did not limit its action to a determination of the levels of discharge of pollutants from the dam that would comply with water quality standards. Therefore, the state exceeded the limited authority which Congress granted it under § 401.

B. The Washington Decision Regarding The Scope Of State Authority Under § 401 Contributes To National Confusion Which Requires This Court's Direction.

State courts have produced divergent decisions interpreting the scope of state authority under § 401 to condition certifications. For example, the Vermont Supreme Court has determined that it is proper for its state agency to regulate aesthetic flows under § 401.⁶ In Connecticut, however, minimum spill requirements based on subjective aesthetic impact are beyond the scope of the state agencies.⁷ Courts in Montana⁸ and Maine⁹ have upheld mandatory § 401 conditions regarding fish passages and habitat. By contrast, in Pennsylvania and New York,¹⁰ courts have found that such conditioning is beyond the scope of authority provided to states under § 401. In Oregon, it

⁶ See *Simpson Paper (Vermont) Co. v. Department of Env'tl. Conservation*, petition for cert. filed, 61 U.S.L.W. 3504 (U.S. Dec. 12, 1992) (No. 92-1012).

⁷ See *Summit Hydropower v. Commissioner of Env'tl. Protection*, No. CV91-050-26-43, 1992 Conn. Super. LEXIS 2177, 1992 WL 175241, (Conn. Super. July 20, 1992), Supreme Court of Connecticut Nos. SC14618 and 14619, argued May 4, 1993.

⁸ See *Hi-Line Sportsmen Club v. Milk River Irrigation Dist.*, 241 Mont. 182, 786 P.2d 13 (Mont. 1990).

⁹ See *Bangor Hydro-Elec. Co. v. Board of Environmental Protection*, 595 A.2d 438, 440 (Me. 1991).

¹⁰ See *Nigara Mohawk Power Corp. v. New York State Dept. of Env'tl. Conservation*, 187 A.D.2d 7, 592 N.Y.S.2d 141 (N.Y. App. Div. 1993), motion for leave to appeal granted, N.Y. Ct. of App., May 11, 1993.

has been held that compliance with state land use laws is not sufficiently water quality related to be included in § 401 review.¹¹

Each state court decision complicates the body of law with which an applicant for a federal hydroelectric project license must comply. The licensing process is becoming increasingly unpredictable. As this Court has explained:

"to require the industry to proceed without knowing whether the [state regulation] is valid would impose a palpable and considerable hardship on the utilities.

...
Pacific Gas & Electric Co. v. State Energy Resources Cons. & Dev. Com'n., 461 U.S. 190, 201-202 (1983). The differing state interpretations have created the current confusion. This confusion requires the Court to examine this issue.

C. This Court Is The Only Forum To Resolve The Conflict Regarding The Scope Of State Authority Under §401.

FERC has taken the position that it lacks the authority to review conditions contained in state certifications. See *Town of Summerville*, 60 FERC ¶ 61,291 at 61,990 (1992) ("since pursuant to § 401(d) of the Clean Water Act all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission"); *Noah Corporation*, 57 FERC ¶ 61,170 at 61,601 (1991) ("we recognize that review of the appropriateness of water quality certification conditions is a matter for state courts to decide"); *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172 (1990) ("review of the appropriateness of water quality certification conditions is the purview of the state courts").

¹¹ *Arnold Irrigation District v. Department of Environmental Quality*, 79 Or. App. 136, 717 P.2d 1274 (1986).

In *Central Maine*, 52 FERC at 61,172, FERC noted that although several of the conditions imposed by the state were unrelated to water quality, FERC was nevertheless bound by § 401 to include the conditions. FERC's position appears to require that a state water quality certification be automatically included in any license issued by FERC. The consequence of this position is that states are free to impose minimum flows or other conditions in § 401 certifications, regardless of whether such conditions are indeed related to water quality standards.

Until this Court provides guidance, "a dual final authority, with a duplicative system of state permits and federal licenses required for each project, [is] unworkable." *First Iowa*, 328 U.S. at 169. This Court should therefore grant certiorari and clarify the authority granted the states under § 401 of the Clean Water Act with the comprehensive federal licensing scheme established by Congress.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

| <u>Name</u> | <u>City</u> | <u>State</u> |
|---------------------------------|---------------|--------------|
| ABB Phoenix Controls | Bothell | WA |
| Alaska Power & Telephone | Port Townsend | WA |
| Central Oregon I.D. | Redmond | OR |
| Chelan PUD | Wenatchee | WA |
| Chelan PUD | Wenatchee | WA |
| CHI West, Inc. | Boise | ID |
| City of Tacoma/Utility | Tacoma | WA |
| Consolidated Hydro, Inc. | Grenich Plaza | CT |
| Consolidated Pumped Stor. | Greenwich | CT |
| David Evans and Associates | Portland | OR |
| Davis Wright Tremaine | Portland | OR |
| Deschutes Valley Water Dist. | Madras | OR |
| Douglas County PUD | E. Wenatchee | WA |
| EBASCO Services, Inc. | Bellevue | WA |
| EDAW | San Francisco | CA |
| EG&G Idaho, Inc. | Idaho Falls | ID |
| Falls Creek HB Limited P. | Eugene | OR |
| Grant County PUD | Ephrata | WA |
| Harza Northwest, Inc. | Bellevue | WA |
| HCI Publications | Kansas City | MO |
| HDR Engineering, Inc. | Bellevue | WA |
| Hydro West Group, INC. | Bellevue | WA |
| Hydro Y.E.S. | Ferndale | WA |
| Ida-West Energy | Boise | ID |
| Impsa International, Inc. | Pittsburgh | PA |
| Kvaeme-Hydro Power, Inc. | Stamford | CT |
| Lilliwaup Falls Generating Co. | Seattle | WA |
| Middle Fork Irrigation Dist. | Parkdale | OR |
| National Hydro | Boston | MA |
| Northrop Devine & Tarbell, Inc. | Portland | ME |
| NW Pipe & Casing Co. | Portland | OR |
| NW Power Planning Council | Portland | OR |
| Okanogan County PUD | Okanogan | WA |
| Pacific Hydro Consulting Group | Alameda | CA |
| Pacific Water Works Supply | Seattle | WA |
| PacifiCorp | Portland | OR |
| Pend Oreille County PUD | Newport | WA |
| Portland General Electric | Portland | OR |

| <u>Name</u> | <u>City</u> | <u>State</u> |
|-----------------------------|--------------|--------------|
| Precision Machine & Supply | Lewiston | ID |
| Puget Power | Bellevue | WA |
| Puget Power | Bellevue | WA |
| R W Beck & Associates | Seattle | WA |
| Ray Toney & Assoc. | Redding | CA |
| Resource Management | Portland | OR |
| Santiam Water Control Dist. | Aumsville | OR |
| Shannon & Wilson, Inc. | Seattle | WA |
| Siemens Power Corporation | Wes Allis | WI |
| Sithe Energies USA, Inc. | New York | NY |
| Snohomish County PUD | Everett | WA |
| STS HydroPower, Ltd. | Issaquah | WA |
| STS HydroPower, Ltd. | Sacramento | CA |
| Tetragenics | Butte | MT |
| Van Ness, Feldman & Curtis | Seattle | WA |
| Van Ness, Feldman & Curtis | Washington | DC |
| Warm Springs Power Ent. | Warm Springs | OR |
| Washington Water Power Co. | Spokane | WA |

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

PUD No. 1 of JEFFERSON COUNTY
AND THE CITY OF TACOMA,
v. *Petitioners,*

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY, DEPARTMENT OF FISHERIES
AND DEPARTMENT OF WILDLIFE,
Respondents.

**On Petition for a Writ of Certiorari to the
Supreme Court of the State of Washington**

**BRIEF OF AMICI CURIAE AMERICAN FOREST &
PAPER ASSOCIATION, AMERICAN PUBLIC POWER
ASSOCIATION, EDISON ELECTRIC INSTITUTE,
AND NATIONAL HYDROPOWER ASSOCIATION
IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Whether the State of Washington Department of Ecology exceeded its authority under section 401 of the Clean Water Act by requiring minimum stream flows for fish habitat as a condition of a water quality certificate issued for a hydroelectric project subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC").

2. Whether the Federal Power Act's grant of ultimate authority to FERC to establish hydroelectric license conditions (including conditions that are inconsistent with state recommendations), after considering recommendations of state wildlife and other regulatory agencies, restricts a state's authority to require non-water quality related minimum flows at hydroelectric projects pursuant to section 401 of the Clean Water Act.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1911

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AND THE CITY OF TACOMA,

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STATE OF WASHINGTON, DEPARTMENT OF
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**BRIEF OF AMICI CURIAE AMERICAN FOREST &
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AND NATIONAL HYDROPOWER ASSOCIATION
IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

INTEREST OF AMICI CURIAE

The American Forest & Paper Association ("AFPA"), American Public Power Association ("APPA"), Edison Electric Institute ("EEI"), and National Hydropower Association ("NHA") submit this brief as *amici curiae*.¹ AFPA is the national trade association of the forest, pulp,

¹ Letters from counsel for Petitioners and Respondents consenting to the filing of this brief by *amici curiae* have been filed with this Court.

paper, paperboard, and wood products industry. APPA and EEI are the national trade associations of the publicly-owned and investor-owned segments of the nation's electric utility industry. Together, APPA and EEI members generate approximately 85% of all electricity in the United States and serve approximately 90% of the nation's ultimate consumers of electricity. NHA is the national association of hydroelectric project owners, builders, equipment suppliers, and consultants.²

The issues raised by Petitioners in their Petition for Review involve the interpretation and implementation by the states of section 401 of the Clean Water Act, and the impact of section 401 on the licensing of hydroelectric projects nationwide. Expansion of state regulation of water flows at hydroelectric projects pursuant to the Clean Water Act will have a broad-ranging impact on the members of AFPA, APPA, EEI, and NHA and on the development and continued reliance on hydroelectric generating projects throughout the country. The members of the *amici* associations hold the large majority of the more than 1,000 hydroelectric project licenses issued by FERC for projects located throughout the United States. Water flow conditions are an essential component of these licenses, directly impacting each project's energy production and other benefits created by the project.

Furthermore, the issues in this proceeding have national implications. Altogether, FERC licensed and other federal and non-federal hydropower projects represent a significant part of America's present energy supply—providing nearly 90,000 megawatts of electricity totaling approximately 12% of the United States' electric capacity.³ Over 150 million consumers in 48 states, including residential,

² The particular interest of each association is more fully described in the Appendix (A. 1a-2a).

³ Edison Electric Inst., *Statistical Yearbook of the Electric Utility Industry/1991*, No. 59, Table 3, p.8 (EEI, Washington, D.C. 1992).

agricultural, commercial and industrial customers, benefit from the power generated by hydroelectric facilities.⁴ The long, useful life of hydroelectric facilities and their low operating and maintenance costs place hydroelectric power among the least expensive sources of electricity, a benefit that inures directly to electricity consumers.⁵ Hydroelectric generation is a clean, renewable source of energy, the use of which limits the emissions that would otherwise result from the burning of fossil fuels. Additionally, the regulation of water at hydroelectric projects provides recreational opportunities to millions of citizens and benefits to fish and wildlife. Multi-purpose hydroelectric projects also support flood control, navigation, irrigation and domestic water supply.

Under authority granted by Congress to FERC in the Federal Power Act, FERC establishes license conditions for projects pursuant to its national jurisdiction to protect and reconcile competing water use demands, such as fish and wildlife habitat, aesthetics, recreation, water quality, navigation, power plant capacity and energy output. The Federal Power Act requires FERC, in licensing and relicensing hydroelectric projects, to give equal consideration to power and non-power interests that may affect interstate water use concerns. By balancing all of these considerations and tailoring appropriate license terms and conditions, FERC is able to ensure that the public interest, as a whole, is served.

In contrast, state water quality agencies have a substantially narrower perspective. Through an overbroad reading of section 401 of the Clean Water Act, the state water quality agency in this proceeding is seeking to usurp FERC's authority over the licensing process, upsetting FERC's ability to weigh power and non-power

⁴ National Hydropower Association, *Hydro Guide: Hydroelectric Resources of the United States*, "Introduction" (NHA, Washington, D.C. 1989).

⁵ *Id.*

considerations in crafting workable hydroelectric project licenses.

As the national voices for all sectors of the hydroelectric industry, *amici* are vitally interested in ensuring that federal statutes governing the development of hydroelectric power are consistently interpreted. Such consistent interpretation will allow state and federal agencies to perform their intended roles in implementing those statutes, thereby ensuring FERC's ability to license projects in a way that safeguards the overall public interest and protects the viability of the nation's hydropower resources.

SUMMARY OF THE ARGUMENT

This Court should grant the petition for writ of certiorari for four reasons. First, the state agency in this proceeding exceeded the authority that Congress granted to it under the Clean Water Act. In upholding the flow conditions imposed by the Washington Department of Ecology on the Elkhorn hydroelectric project in Tacoma, the Washington Supreme Court held that section 401 of the Clean Water Act grants the State of Washington the authority to impose non-water quality-based minimum stream flow conditions to protect fish habitat. The Washington Supreme Court's interpretation of the authority granted to the states under section 401 of the Clean Water Act conflicts with the express provisions of that Act. Moreover, the decision below eviscerates provisions of the Federal Power Act in which Congress expressly granted FERC ultimate authority over this issue and is inconsistent with this Court's opinions in *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946) and *California v. FERC*, 495 U.S. 490 (1990), which interpret the scope of FERC's licensing authority in relation to the state regulation of water.

Second, state court decisions that interpret the scope of state authority under section 401 of the Clean Water Act are divided, causing uncertainty and necessitating

guidance from this Court. The Washington Supreme Court's opinion merely adds to a confusing array of divergent opinions that interpret the scope of authority that Congress granted to the states under section 401. These conflicting state court opinions demonstrate the inconsistent application of federal law by various courts and create substantial confusion among the states, for FERC and for the hydroelectric industry.

Third, as a result of FERC's and the federal courts' determination that they are largely unable to review state action under section 401 of the Clean Water Act, the Washington Department of Ecology's action presents a federal question that only this Court can resolve. Because the language of section 401(d) requires FERC to accept water quality certifications issued by states pursuant to section 401, FERC has determined that it lacks authority to review conditions contained in state certifications. Additionally, federal courts have deferred to state courts the issue of the propriety of conditions imposed in water quality certifications issued by states. Therefore, absent a decision from this Court, each state's water quality agency and the courts of each state will remain free to adopt whatever expansive interpretation of that state's 401 certifying authority they deem appropriate.

Fourth, the Washington Supreme Court's decision threatens to seriously disrupt the FERC hydropower licensing process. The practical consequence of the Washington Supreme Court's decision regarding the scope of state authority under section 401 is that individual states may usurp FERC's licensing authority. Under the Washington Supreme Court's interpretation of section 401 of the Clean Water Act, a state may impose flow conditions that severely constrain FERC's ability to establish reasonable license terms and conditions that are designed to address a broader range of factors affecting the public interest. Flow conditions are of primary importance in a federal hydropower license. They affect not only power

production but also project economics, project viability, recreation, navigation, fish and wildlife habitat, and a host of other concerns that FERC, but not a state water quality agency, must consider under the Federal Power Act. A state water resource agency that has no obligation to consider the impact of its decisions on energy production and the other benefits of hydroelectric projects can now decide the fate of hydroelectric projects instead of FERC, the agency to which Congress delegated authority to make those decisions.

Forty-eight states now have federally licensed hydro-power projects under FERC jurisdiction. Without guidance from this Court, inconsistent decisions regarding the scope of the states' authority to impose stream flows unrelated to water quality at a hydroelectric project as a condition of a section 401 certification will continue to erode FERC's authority to establish a national energy policy and cause uncertainty and delay in the licensing of hydroelectric projects nationwide.

ARGUMENT

I. THE WASHINGTON SUPREME COURT'S DECISION IMPROPERLY EXPANDS THE AUTHORITY GRANTED THE STATES UNDER SECTION 401 OF THE CLEAN WATER ACT AND THEREBY ESTABLISHES A CONFLICT BETWEEN STATE AND FERC JURISDICTION OVER THE HYDROELECTRIC LICENSING PROCESS THAT ONLY THIS COURT CAN RESOLVE.

A. The Washington Supreme Court's Decision Improperly Expands The Authority Granted The States Under Section 401 Of The Clean Water Act And Is Inconsistent With This Court's Interpretation Of FERC's Jurisdiction Under The Federal Power Act.

Under the Washington Supreme Court's interpretation of section 401 of the Clean Water Act, a state may impose conditions on a FERC license, such as minimum stream flows to protect fish habitat, that directly conflict

with the authority granted FERC under the Federal Power Act. Congress did not intend for section 401 to apply so expansively. Rather, in allowing states to condition water quality certificates pursuant to section 401, Congress provided the states with authority to impose appropriate conditions based on applicable effluent limitations, water quality standards and other provisions specified in section 401(d) as well as state law requirements directly relevant to such factors. The Supreme Court of Washington's interpretation of section 401 significantly exceeds the bounds of this authority and, consequently, upsets the balance of authority that Congress has established between state certification authorities under section 401 and the federal licensing and permitting agencies that require section 401 water quality certificates.

1. *The Washington Department Of Ecology Exceeded The Authority Granted To The States Under The Clean Water Act.*

Rather than repeat the entire argument made by the Petitioners regarding the State of Washington's failure to act within the parameters of the limited authority granted to it under section 401 of the Clean Water Act, the *amici* adopt those arguments by reference. To summarize, the Clean Water Act was enacted to regulate the discharge of pollutants into the nation's waters. In section 401 of the Clean Water Act, Congress provided the Environmental Protection Agency with authority to limit the discharge of pollutants through a permitting process and through the development of effluent guidelines and water quality standards that are applied to determine the specified levels of discharge to be permitted. In addition, pursuant to the Clean Water Act, individual states can assume certain responsibility for developing water quality standards subject to the approval of the EPA. Specifically, section 401 grants states the limited authority to certify that federally-licensed projects will comply with applicable water quality standards and other criteria spec-

ified in the Clean Water Act concerning the discharge of pollutants. Section 401 further provides that states may condition water quality certificates to ensure compliance with these requirements and "other appropriate requirements of state law" concerning activities that may result in the discharge of pollutants. This narrow grant of authority to the states was not intended to override other areas of responsibility not involving the discharge of pollutants that Congress reserved to federal licensing and permitting agencies.

In this case, as a condition in the certificate to PUD No. 1 of Jefferson County and the City of Tacoma ("Tacoma"), the Washington Department of Ecology established month-by-month stream flow requirements for fish habitat that the Department concedes were in excess of those required for water quality. Washington's published water quality standards pertain to such matters as fecal coliform, dissolved oxygen, dissolved gases, and other micro characteristics. By not limiting the section 401 condition to minimum stream flows designed to ensure that the project would comply with these water quality standards and related requirements concerning the discharge of pollutants, the state exceeded the limited authority that Congress granted it under section 401. Accordingly, the state's 401 conditions would substantially diminish, if not eliminate, the diversion of stream flow necessary to make the Elkhorn Project economically viable for the generation of electricity.

2. The Washington Decision Is Incompatible With Federal Regulation Of Hydropower As Interpreted By This Court.

In 1920, Congress established the federal licensing program for hydroelectric projects in the Federal Water Power Act, 41 Stat. 1063, later incorporated into the Federal Power Act in 1935, 16 U.S.C. §§ 791a *et seq.* Pursuant to the Federal Power Act, FERC and its predecessor, the Federal Power Commission, have issued reg-

ulations that govern the contents of applications for hydroelectric projects and, over time, have made revisions to those regulations as needed. In 1981, largely in response to the National Environmental Policy Act, FERC revised the regulations once more. *See* 46 Fed. Reg. 55926, 55929-30 (1981). Among other things, those regulations require license applicants to prepare the following reports:

Water Use and Quality Report

Fish, Wildlife and Botanical Resources Report

Historic and Archaeological Resources Report

Socio-Economic Impact Report

Recreational Resources Report

As part of the Water Use and Quality Report, license applicants are required to submit a copy of the state's section 401 water quality certificate or a copy of a request for such certification.

In 1986, more than a decade after enacting the Clean Water Act, Congress enacted the Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243 (1986) ("ECPA"), which amended the Federal Power Act and required FERC, pursuant to Section 4(e) of the Federal Power Act, to give "equal consideration" to power and nonpower values including "the protection, mitigation of, damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)." *See* 16 U.S.C. § 797(e). Section 10(j) of the Federal Power Act, which was added by ECPA, reaffirmed FERC as the ultimate decision-maker regarding fish and wildlife-related concerns. *See* 16 U.S.C. § 803(j). While section 10(j) requires FERC to give special deference to recommendations by state and federal fish and wildlife agencies regarding conditions appropriate for fish and wildlife habitat, it allows FERC to depart from recommendations that are

inconsistent with Part I of the Federal Power Act or other applicable law. Thus, pursuant to its authority, FERC independently reviews stream flows and impact on fish habitat. In addition, in the deliberations which FERC undertakes pursuant to section 10(a) of the Federal Power Act, FERC must consider all factors affecting the public interest in the comprehensive development of the waterway. Therefore FERC is required to weigh and balance numerous other factors not considered by state water quality agencies under section 401 of the Clean Water Act, including the effects of a project on fish habitat.

During the debates leading to the enactment of ECPA, the states sought a provision that would have vested in the states the authority to mandate minimum stream flows to protect fisheries. See *Rock Creek Ltd. Partnership*, 38 F.E.R.C. ¶ 61,240 n.8 (1987). After circulating a position paper advocating further amendments to the Federal Power Act that would have granted the states control over the appropriation, diversion, and use of water by licensed projects, and, after a Congressional hearing, Congress declined to grant the states any additional authority to establish minimum stream flows for licensed projects in ECPA. Instead, Congress reaffirmed FERC's exclusive authority to establish minimum stream flows to protect fish habitat by amending the Federal Power Act to include section 10(j). 16 U.S.C. § 803(j).

The conference report confirms that while section 10(j) leaves final decisions to FERC, ECPA did increase the states' role in determining minimum flow requirements by directing FERC to give special deference to the states' fish and wildlife recommendations. See H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 21, at 23, 25 (1986), reprinted in 1986 U.S.C.C.A.N. 2537, at 2539, 2541. Increasing the states' authority would have been unnecessary

if Congress had previously granted the states authority pursuant to section 401 of the Clean Water Act to impose minimum stream flows at FERC licensed projects.

Forty-seven years ago, this Court recognized that the exclusive nature of the federal hydroelectric licensing process preempts conflicting state action. In *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946), the Court rejected the State of Iowa's efforts to impose a state permitting requirement on an applicant that was attempting to obtain a hydroelectric license from the Federal Power Commission. The Court concluded that allowing the state to impose a permitting requirement would in effect grant the state veto power over the license and thereby subvert Congress' intention to concentrate comprehensive hydropower planning authority in the Federal Power Commission. *First Iowa*, 328 U.S. at 164.

More recently, this Court considered the State of California's authority to impose minimum flow requirements to protect fisheries in *California v. FERC*, 495 U.S. 490 (1990). In that action, California argued that section 27 of the Federal Power Act, which reserves certain authority regarding proprietary water rights to the states, provided the state with authority to impose mandatory flow requirements for fish and wildlife. This Court rejected this contention and unanimously held that the flow requirements mandated by California were preempted by the federal licensing process. In making this determination, this Court specifically recognized that the addition of section 10(j) to the Federal Power Act reaffirmed "*First Iowa's* understanding that the Federal Power Act establishes a broad and paramount regulatory role" in the area of fish and wildlife license conditions. See *California v. FERC*, 495 U.S. at 499.

In this proceeding, the Washington Department of Ecology has imposed minimum flow requirements for

the Elkhorn project based upon recommendations made by state fish and wildlife agencies pursuant to statutes unrelated to the state's water quality standards. The Washington Supreme Court upheld the state agency's decision by concluding that the phrase "any other appropriate requirement of State law" in section 401(d) does not refer only to state water quality standards. *Washington Dep't of Ecology v. PUD No. 1*, 121 Wash. 2d 179, 849 P.2d 646, 653 (1993). Specifically, the court found the quoted phrase to be "a congressional authorization to the states to consider all state action related to water quality in imposing conditions on Section 401 certificates." *Id.* In Washington, the very state actions the Washington Supreme Court references would include the establishment of flows to provide for "preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." Wash. Rev. Code § 90.54.020(3)(a) (1991). Because FERC believes that it must accept the terms of the 401 certificate as a part of the license, the inclusion of the conditions in the section 401 water quality certificate makes such conditions mandatory on the Elkhorn project. As a result, the Washington Supreme Court's interpretation of section 401 removes FERC's authority to consider other stream flow recommendations for fish habitat at the Elkhorn project pursuant to section 10(j) of the Federal Power Act and to balance competing uses of the water resource as mandated by section 10(a) of the Federal Power Act.

If the State of Washington had attempted to impose minimum flow requirements or any other conditions on the Elkhorn project under any state statute independent of the Clean Water Act, the state's action would directly conflict with the authority granted to FERC under the Federal Power Act as reaffirmed by this Court in *First Iowa* and *California v. FERC*. It is inconceivable that Congress intended for section 401(d) of the Clean Water

Act to provide the states with the very authority that this Court has found Congress expressly reserved to FERC in ECPA.

B. Only This Court Can Resolve The Conflict Regarding The Scope Of Authority Granted The States Under Section 401 Of The Clean Water Act.

1. The Washington Decision Is Only One Example Of The Confusion Regarding The Scope Of Authority That Congress Granted The States Under Section 401.

Although the scope of authority that Congress granted the states under section 401 has been scrutinized by a number of state courts, no clear standards have emerged. Rather, increasingly divergent decisions by state courts have created inconsistent legal standards regarding state authority under section 401. This divergence of opinions threatens the established licensing process and ultimately the development of hydropower.

The courts of various states have issued opinions that broadly interpret the authority that Congress granted the states under section 401. The Vermont Supreme Court, for instance, has determined that section 401 provides the Vermont Department of Environmental Conservation with authority to impose minimum spillage requirements for aesthetic and recreational purposes. *See Georgia Pacific Corp. v. Department of Env'tl. Conservation*, No. 91-530 (Vt. Sept. 14, 1992), *petition for cert. filed sub nom, Simpson Paper (Vermont) Co. v. Department of Env'tl. Conservation*, 61 U.S.L.W. 3504 (U.S. Dec. 14, 1992) (No 92-1012) (A. 3a-6a). In Oregon, a state appellate court has stated that section 401 grants the state authority to condition certification on compliance with *all* state statutes that have a relationship to water quality. *Arnold*

Irrigation Dist. v. Department of Env'tl. Quality, 79 Or. App. 136, 717 P.2d 1274, 1279 (1986). Additionally, the Maine Supreme Court has held that in the section 401 certification process, the Maine Board of Environmental Protection possesses the authority to demand and examine information relating to the effect of the proposed project on fishing, recreation, and fish habitat. *Bangor Hydro-Electric Co. v. Board of Env'tl. Protection*, 595 A.2d 438 (Me. 1991).

The courts of other states have interpreted the authority that Congress granted the states under section 401 much more narrowly. In contrast to the Vermont Supreme Court's decision in *Georgia Pacific*, a Connecticut court has determined that the Connecticut Department of Environmental Protection is not authorized to mandate minimum stream flows based on subjective aesthetic impact. See *Summit Hydropower v. Commissioner of Env'tl. Protection*, No. CV91-050-26-43, 1992 Conn. Super. LEXIS 2177 (Conn. Super. Ct. July 20, 1992). Moreover, a New York court has decided that the State of New York may not condition its certification of a hydroelectric project on compliance with state laws concerning, among other things, fish and wildlife and recreational opportunities. See *Niagara Mohawk Power Corp. v. New York State Dep't of Env'tl. Conservation*, 187 A.D.2d 7, 592 N.Y.S.2d 141 (N.Y. App. Div. 1993). Similarly, a court in Pennsylvania has determined that the Pennsylvania Department of Environmental Resources does not possess authority under section 401 to consider the effect of a proposed project on wetlands and fish migration and to condition certification on compliance with state laws that concern such matters. *Pennsylvania Dep't of Env'tl. Resources v. City of Harrisburg*, 133 Pa. Commw. 577, 578 A.2d 563, 567 (1990).

Each new state court decision interpreting state authority under section 401 further complicates the body of law governing the licensing process. These conflicting opin-

ions not only create inconsistent demands on applicants but also constrain FERC's ability to issue hydroelectric licenses pursuant to its statutory obligation under the Federal Power Act to weigh all relevant considerations. A review of the Washington Supreme Court's decision would enable this Court to clarify the scope of state authority under section 401 and end the uncertainty and inefficiency created by conflicting state court decisions.

2. A Decision From This Court Is Necessary Because FERC Has Determined That It Will Not Contest The Scope Of State 401 Certifications, And Federal Courts Defer To State Courts On This Issue.

Section 401(d) of the Clean Water Act provides that any water quality certification issued by a state "shall become a condition on any Federal license or permit" that is subject to section 401. Because of this mandatory language, federal courts have prohibited federal agencies from disallowing water quality certification conditions even when the agencies believe such conditions may violate the Act. See *United States Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992) ("FERC may not alter or reject conditions imposed by the States through section 401 certificates."); see also *Roosevelt Campobello Int'l Park Comm'n v. U.S. Env'tl. Protection Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982); *Lake Erie Alliance for Protection of Coastal Corridor v. U.S. Army Corps of Engineers*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981), *aff'd*, 707 F.2d 1392 (3d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 234 (S.D. Ala. 1976).

Furthermore, FERC has taken the position that it lacks the authority to review conditions contained in state certifications. See *Town of Summersville*, 60 F.E.R.C. ¶ 61,291 at 61,990 (1992) ("[S]ince pursuant to Section 401(d) of the Clean Water Act all of the conditions in the water quality certification must become conditions

in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission.”); *Noah Corp.*, 57 F.E.R.C. ¶ 61,170 at 61,601 (1991) (“[W]e recognize that review of the appropriateness of water quality certification conditions is a matter for state courts to decide.”); *Central Maine Power Co.*, 52 F.E.R.C. ¶ 61,033 at 61,172 (1990) (“[R]eview of the appropriateness of water quality certification conditions is the purview of the state courts.”). Although FERC has expressed its opinion that certain state mandated conditions are beyond the scope of water quality certification under section 401, FERC has maintained the position that it is bound by section 401 to include such inappropriate conditions in the applicant’s license. *Central Maine*, 52 F.E.R.C. at 61,172.

Because section 401(d) dictates that a state water quality certification is automatically included in any license issued by FERC, states currently are free to impose minimum flows or other conditions in section 401 certifications, regardless of whether such conditions are in fact water quality “criteria” related. This results in “[a] dual final authority, with a duplicative system of state permits and federal licenses required for each project,” that this Court found unworkable in *First Iowa*. See *First Iowa*, 328 U.S. at 169. This Court should therefore grant certiorari and harmonize the authority granted the states under section 401 of the Clean Water Act with the comprehensive authority that Congress granted FERC in the Federal Power Act as amended by ECPA.

II. THE FERC HYDROPOWER LICENSING PROCESS WILL BE EFFECTIVELY PARALYZED AND THE NATION’S HYDROPOWER PROJECTS WILL BE SEVERLY AFFECTED IF STATES ARE ALLOWED TO IMPOSE MINIMUM FLOW CONDITIONS FOR FISH HABITAT AND OTHER NON-WATER QUALITY CONDITIONS THROUGH SECTION 401 CERTIFICATIONS.

The Washington State Department of Ecology and the Washington Supreme Court have interpreted section 401 of the Clean Water Act very expansively. In so doing, they have directly interfered with the FERC hydropower licensing process established by Congress in the Federal Power Act and have impeded the ability of the nation to rely on hydropower as a source of generating capacity in planning for and supplying the country’s energy requirements.

The absence of a ruling from this Court will continue to spark disputes over section 401 conditions, causing substantial delays that will increase project licensing costs and render ever more uncertain a project’s economic viability. This proceeding is an example of this problem. The license applicants in this case have been forced to appeal the state’s section 401 conditions through several levels of administrative and judicial review, taking years and involving substantial costs. This process also places demands on the limited resources of the administrative agencies and the courts. According to FERC’s own records, between 1993 and 2010, FERC will be charged with the task of relicensing 416 hydroelectric projects with a total power capacity of 26.202 gigawatts. These figures do not reflect new applications for hydroelectric power projects. Thus, the potential for litigation and administrative delays to resolve section 401 disputes is enormous. Because of the importance of the issues presented by section 401 certifications, such disputes are not uncommon and are likely to continue to arise absent guidance from

this Court. The licensing process already is lengthy and costly—to relicense a project can take six to eight years or more and cost millions of dollars. Disputes arising under section 401 only exacerbate the situation.

If states are allowed to mandate minimum flows for fish habitat (or any other non-water quality conditions) under the guise of the Clean Water Act, without appropriate balancing assessments made by FERC, hydroelectric power and the many benefits it provides to consumers, communities, and the nation will be severely affected. An increase in minimum flows at a hydroelectric project—in this case, for fish habitat—results in lost energy production (as water is spilled through the bypass reach thus avoiding generation) or in the production of energy when it is uneconomic or not needed. In addition, FERC may not be able to issue a license for a particular project at all because under a state's conditions the project would not be viable or able to meet other conditions that FERC considers necessary. In each case, the lost hydropower must be replaced. To replace the lost power, electric suppliers must turn to other forms of production, particularly fossil fuel generation with consequent effects on air quality, cost, diversity of the nation's energy supply, and other interstate interests. Furthermore, increased minimum flows can adversely affect other beneficial uses of the waterway, including recreation and water supply.

By granting the petition for writ of certiorari in this case, the Court will have the opportunity to provide clear guidelines regarding the states' authority under section 401. A current uniform interpretation of section 401 is required to achieve the water quality purposes of the certification process while retaining the careful balance of state and federal authority that is fundamental to a rational and comprehensive program for licensing our nation's hydroelectric power projects.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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August 6, 1993

APPENDIX

APPENDIX

THE AMICI

1. *American Forest & Paper Association*

American Forest & Paper Association ("AFPA") is the national trade association of the forest, pulp, paper, paperboard, and wood products industry which, as a group, is the third largest producer of electricity among manufacturers in the United States, and is one of the nation's leaders in the development and use of hydroelectric power. AFPA represents approximately 550 member companies and related trade associations (whose memberships are in the thousands) which grow, harvest and process wood and wood fiber, manufacture pulp, paper and paperboard products from both virgin and recovered fiber, and produce solid wood products. As a single national trade association, AFPA represents an industry that accounts for over 7 percent of the total United States manufacturing output and 90 percent of domestic recycled paper manufacturing capacity.

2. *American Public Power Association*

American Public Power Association ("APPA") is the national organization representing 1,750 of the nation's 2,000 local public power systems. These systems are located in every state except Hawaii and range in size from the largest public power system, the Los Angeles Department of Water and Power with more than 1.3 million customers, to small towns with fewer than 100 customers. Public power systems own approximately 11.9 percent of the total installed electric utility generating capacity in the United States. Hydroelectric projects, with a total installed capacity of 18,426,063 kilowatts, comprise nearly 21 percent of public power's total generation. There are 90 APPA member utilities with hydroelectric capacity. Certain of these utilities, such as the New York Power Authority and the South Carolina Public Service

Authority, market this hydroelectric power at wholesale to other publicly owned utilities.

3. *Edison Electric Institute*

Edison Electric Institute ("EEI") is the association of the nation's investor-owned electric utility companies.¹ Its members serve 97 percent of the customers of the investor-owned segment of the industry and 73 percent of all consumers of electricity in the United States. EEI's members generate 78 percent of all the electricity in the United States and service 76 percent of the nation's ultimate customers. A large number of EEI's members rely, either directly or through power purchase agreements, upon hydroelectric power to supply their customers' needs and to operate their systems. Over the last eighty years, investor-owned utilities have developed, operated and maintained large numbers of hydroelectric projects, and today operate approximately 366 such projects under licenses issued by the Federal Power Commission or its successor, the Federal Energy Regulatory Commission. These projects serve over 100 million Americans in forty-one states. As the national representative of the single largest group of hydroelectric project licensees, EEI has a vital interest in ensuring that the federal statutes governing the licensing of hydroelectric projects are interpreted consistently and implemented properly.

4. *National Hydropower Association*

National Hydropower Association ("NHA") is the non-profit association established in 1983 to be a national voice for the hydropower industry. NHA has over 100 members from all segments of the hydroelectric industry, including investor-owned utilities, cooperatives, municipalities, private developers, manufacturers, engineers, and legal, financial and consulting firms from all regions of the country.

¹ Consumers Power Company, a member of EEI, does not join in this *amici* filing.

VERMONT SUPREME COURT
Supreme Court Docket No. 91-530
MAY TERM, 1992

GEORGIA-PACIFIC CORPORATION
and SIMPSON PAPER (VERMONT) CO., INC.

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION
and SIERRA CLUB

Appealed From: Washington Superior Court
Docket No. S473-89 WnCa

ENTRY ORDER

In the above entitled cause the Clerk will enter:

Plaintiffs appeal a Washington Superior Court judgment affirming a decision of the Vermont Department of Environmental Conservation (DEC). They seek to set aside continuous spillage conditions in a § 401 water quality certification, or, alternatively, seek a remand to the DEC for consideration of additional evidence, or a remand to superior court for de novo review. We affirm.

Plaintiffs' contention that the court's denial of their request to remand to the DEC for additional evidence and reconsideration was an abuse of discretion is without merit. A remand to an administrative agency is meant only as a "safety valve" to be used if justice so requires. *In re Maple Tree Place*, 156 Vt. 494, 499 (1991) (quoting *State ex rel. Gunstone v. Washington State Highway*

Commission, 72 Wash. 2d 673, 674, 484 P.2d 784, 735 (1967)). The court found that plaintiffs had the opportunity, which they did not take, to present evidence of their management proposal to the DEC. Further, the court found that the additional proceedings would be a waste of time and expense and would most likely not change the result. These findings are not clearly erroneous and amply support the court's discretionary ruling.

Plaintiffs argue they were entitled to a de novo hearing on the merits in superior court. Plaintiffs, however, waived any opportunity for a de novo hearing with the court, as illustrated by the following exchange at a pending motions hearing:

The Court: . . . It is your position that this is not a de novo hearing?

Mr. Pearson: My position today is—and if my feet were held to the fire, I don't think it is—but I think on the other hand, an argument could be made that the Rule 75 does not preclude a de novo hearing. It leaves it to other applicable law to decide what the hearing is. I think if we really want to work at it, we could make an argument that in this context a de novo hearing would be appropriate. I've yet to convince Washington counsel and my client one way or the other on that issue. My personal feeling is I think it probably is not a de novo hearing, although, as I say, I think an argument could be made, and I just haven't convinced them to forget about that little argument we could make and get on with the business of just having this heard on the administrative record.

. . . .

The Court: [I]t would appear that the only issue is whether the plaintiff has almost agreed that it's not going to be a de novo hearing. The State agrees that it's not going to be a de novo hearing? Yes.

. . . .

The Court: Do you [Sierra Club]—is it your position that this is a de novo hearing or is it not?

Mr. Smith: It's the Club's position that this is a review of the administrative record.

The Court: Right. I think maybe we have an agreement.

At no further time was there consideration of whether review would be de novo. The court was never asked to rule, nor did it rule, on the de novo issue raised here.

Plaintiffs also argue for the first time on appeal that denial of a remand to the DEC violated their constitutional rights. These challenges are likewise waived. *In re Quechee Lakes Corp.*, 154 Vt. 543, 552, 580 A.2d 957, 962 (1990).

Plaintiffs lastly contend that the spillage requirement was not supported by the evidence and that it was beyond the DEC's authority under federal law to consider aesthetic and recreational factors as grounds for a spillage requirement. The Clean Water Act allows the state to impose conditions in a § 401 certification to ensure applicant's compliance with certain criteria, including "any other appropriate requirement of State law." 33 U.S.C. § 1341 (d). Vermont's water quality standards promulgated in accordance with this Act require that the Connecticut River be managed for "water of a quality which consistently exhibits good aesthetic value . . . and recreation." Vermont Water Quality Standards § 3-03. The DEC spillage requirement was amply supported by the evidence. Not only were aesthetics and recreation considered relevant, ease of administration and monitoring were fostered by the requirement. *See in re Sherburne*, 154 Vt. 596, 607, 581 A.2d 274, 280 (1990) (added deference afforded agency determinations in highly technical fields).

Affirmed.

6a

BY THE COURT:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice

/s/ Ernest W. Gibson III
ERNEST W. GIBSON III
Associate Justice

/s/ John A. Dooley
JOHN A. DOOLEY
Associate Justice

/s/ James L. Morse
JAMES L. MORSE
Associate Justice

/s/ Denise R. Johnson
DENISE R. JOHNSON
Associate Justice

5
NO. 92-1911

FILED
AUG 6 1993

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

PUD NO. 1 OF JEFFERSON COUNTY AND
THE CITY OF TACOMA,

PETITIONERS

v.

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY, DEPARTMENT OF FISHERIES
AND DEPARTMENT OF WILDLIFE

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF PACIFIC NORTHWEST UTILITIES,
AMICI CURIAE, IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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BRIEF OF PACIFIC NORTHWEST UTILITIES.

AMICI CURIAE, IN SUPPORT OF

PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

Much of the electrical generating capability in the Pacific Northwest is hydroelectric. This brief is filed on behalf of ten Pacific Northwest utilities, which are individually described in Appendix A. Some of these utilities are publicly owned and some are investor owned. Some are located in the State of Washington and some are located elsewhere. These amicus parties own and operate many of the largest nonfederal projects in the Pacific Northwest.

For many purposes, these utilities are competitors. They share, however, a united interest in and concern about the critical need to maintain the long-standing coordinated planning and operation of the Pacific Northwest's regional hydroelectric system. As explained below, it is imperative that these utilities operate their separate projects in coordination with one another. That coordinated operation

would be impossible if each individual state could determine unilaterally the minimum streamflows for each hydroelectric facility within its borders.

SUMMARY OF ARGUMENT

Congress intended, and for good reason, that final authority for determining the conditions of hydroelectric project licenses be vested in the Federal Energy Regulatory Commission ("FERC"). Congress has placed certain authority concerning water quality standards in the hands of the states. However, Congress did not intend to give the states veto power over hydroelectric licenses by authorizing them to impose license conditions which are in any way water-related. When the states have asked for that kind of veto power, Congress has refused to provide it.

The Pacific Northwest provides excellent examples of the importance of coordination in the operation hydroelectric projects and of the process of attaining that coordination. Many different, and often conflicting, interests must be taken into account. Individual Pacific Northwest project licenses

illustrate how FERC accommodates interests as diverse as flood control and navigation, the needs of nuclear installations, fish and wildlife protection, archaeological survey and salvage, recreation, the rights of Indian tribes, the jurisdictional concerns of states and local governments, and federal rights and obligations under the Columbia River Treaty with Canada. Those illustrative licenses make it clear that regulatory constraints unilaterally imposed by individual states would have impacts far beyond the borders of those states. They would render the highly complex and coordinated hydroelectric system in the Pacific Northwest unworkable.

The Federal Power Act, as recently amended in the Electric Consumers Protection Act of 1986, provides for meaningful state participation in decisions about hydroelectric power. However, Congress never intended that the final decisions about project licenses be in the hands of the states. Rather, it has assigned to FERC both the responsibility to carry out federal policies and the ultimate authority which is necessary to meet that responsibility.

ARGUMENT

The purpose of this amicus brief is not to duplicate the arguments presented in the petition for writ of certiorari. Rather, it focuses on two aspects of the context in which the issues presented by the petition should be considered in order to show that much more is at stake in this case than the fate of individual hydroelectric projects.

First, this brief addresses the legal context: the proper relationship between Section 401 of the Clean Water Act and the regulatory system which Congress has created for the licensing of hydroelectric projects on the nation's waters.

Second, it describes the practical context: the operation of the hydroelectric system in the Pacific Northwest, where this case arose.

- I. In the Clean Water Act Congress Created a Narrow Exception to FERC's Paramount Licensing Authority To Allow the States To Enforce Their Water Quality Standards. Congress Did Not Intend To Allow the States To Dictate. Without Review by FERC. Other

Water-Related Conditions of Hydroelectric Project Licenses.

The Washington Supreme Court has held in this case that the states may unilaterally impose minimum streamflow requirements, or other water-related requirements, as conditions of a federal license to operate a hydroelectric facility. Because most aspects of the construction and operation of a hydroelectric project can be viewed as water-related, the court's rationale allows the state to impose conditions addressing a broad range of issues. As demonstrated by the facts of this case, the conditions may be so onerous as to give the state a de facto veto power by rendering the project uneconomic. FERC, the agency charged by Congress with comprehensive planning and licensing authority over the nation's hydroelectric facilities, has concluded that it cannot review or modify those conditions, even when it believes they are legally improper. See Town of Summersville, 62 F.E.R.C. ¶ 61,291 (1992),

reh'g denied 63 F.E.R.C. ¶ 61,037 (1993); Central Maine Power Co., 52 F.E.R.C. ¶ 61,033 (1990).

The Washington State Department of Ecology expressly stated that, in order to protect fisheries, it was requiring minimum streamflows in excess of those required to maintain water quality (App. 83a-84a). The Washington Supreme Court mistakenly found the state's authority to create such minimum requirements in Section 401 of the Clean Water Act, 33 U.S.C. § 1341. The Washington Supreme Court's interpretation of Section 401 is in direct conflict with that of the New York Court of Appeals in In re Power Auth. v. Williams, 457 N.E.2d 726, 730 (N.Y. 1983) (holding, because of the preemptive jurisdiction granted by the Federal Power Act to the Federal Energy Regulatory Commission, that "[t]he section 401 certification process is accomplished by a determination that a proposed project will meet the particular water quality standards for the applicable classification.")

As shown by the petition, the Washington Supreme Court's decision is wrong as a matter of law.¹ It is also highly disruptive of the scheme of paramount federal authority over hydroelectric facility licensing which Congress fashioned long ago.

In First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946), this Court held that the Federal Power Act ("FPA") created exclusive federal authority over hydroelectric facility licensing -- an authority which leaves no room for conflicting state controls. That reading of the FPA was recently reaffirmed in California v. F.E.R.C., 495 U.S. 490 (1990), in which the Court pointed out that Congress itself,

¹Streamflow requirements to protect fisheries are not "water quality" requirements within the meaning of the Clean Water Act. The Clean Water Act itself distinguishes between streamflow requirements to protect water quality and streamflow requirements for fish and wildlife. 33 U.S.C. § 1252(b)(2). Moreover, under Section 401(a) of the Act, 33 U.S.C. § 1341(a), state certification is required only if the activity for which a permit is sought is one which may result in a discharge. The removal of water from a stream is not a "discharge" (nor is it "water pollution" as the Washington Supreme Court held).

when it enacted the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495 ("ECPA"), reaffirmed First Iowa's understanding that the FPA established a paramount federal regulatory role. 495 U.S. at 499.

When Congress creates exceptions to FERC's paramount power to determine the conditions of hydroelectric licenses, it does so clearly and specifically. See, e.g., Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984). Where water quality is concerned, Congress has decided that a hydroelectric project should not be licensed unless it can operate in compliance with water quality standards. Section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d), authorizes the states to place mandatory water quality conditions, which FERC treats as beyond its power to review, on those licenses. Congress has not, however, authorized the states to create such conditions in connection with water quantity for fisheries, or the many other state concerns which can be related to the use of water. In fact, although the states have asked Congress in the past

for the kind of veto power which the State of Washington asserts in this case, Congress has refused to grant that power.

The states asked Congress to grant to them, in ECPA, authority to set mandatory minimum streamflows to protect fisheries. See Rock Creek Limited Partnership, 38 F.E.R.C. ¶ 61,240, n.8; H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 23-25 (1986). Congress clearly and unequivocally refused to grant the states that authority. Instead, Congress added new Section 10(j) to the FPA,² requiring that FERC include in hydroelectric licenses conditions to protect fish and wildlife.

FERC decides what those conditions will be; the states do not. In establishing license conditions FERC must take into account the recommendations of state fisheries agencies, and must affirmatively and clearly justify any decision not to adopt them.³ They remain recommendations, however.

²16 U.S.C. § 803(j). ECPA contains related amendments to Sections 4(e) and 10(a), 16 U.S.C. §§ 797 (e), 803(a).

³Each license issued by FERC "shall include conditions for * * * protection, mitigation, and enhancement" of fish and wildlife. 16 U.S.C. § 803(j)(1). Those conditions "shall be
(continued...)

Congress specifically determined that FERC was not automatically to be bound by them. Although the new Section 10(j) of the FPA "certainly upgrade[d] statutorily the importance and status of fish and wildlife recommendations," it did "not give such agencies a veto, nor [did] it give them mandatory authority." H.R. Conf. Rep. No. 934, supra, at 25.

Congress thus specifically addressed state fish and wildlife concerns in the hydroelectric licensing process. Congress expressly granted the states a substantial and influential voice in the FERC proceedings. At the same time Congress deliberately refused to give the states the last word. It is FERC, not the states, that Congress has charged with the ultimate authority to balance and provide for the protection of local fish and wildlife interests, and also local

³(...continued)

based on recommendations" from state fish and wildlife agencies, among other sources. Id. If FERC chooses not to adopt any such recommendations, it must justify that choice by published findings explaining how adoption of the recommendation in question would be inconsistent with law. 16 U.S.C. § 803(j)(2).

interests in such matters as flood control, safety, recreation, land-use planning, and aesthetics.

The states would have had no need to seek authority under ECPA to dictate minimum streamflows for fisheries if they had already had that very authority under the Clean Water Act for more than a decade.⁴ If, as the Washington Supreme Court held in this case, Section 401 of the Clean Water Act had authorized the states to unilaterally impose minimum flows as mandatory conditions of federal licenses since 1972, Congress would not have needed to "upgrade" the status of the states' streamflow recommendations in 1986.

The reasons why Congress has been unwilling to give ultimate authority to the states are not difficult to understand. Such a power granted to the individual states would necessarily be exercised to protect the states' own local interests. The State of Washington's Water Resources Code,

⁴And see S. 1081, 102nd Congress, which would have amended the Clean Water Act to give states the authority, which Washington now claims it already had, to impose additional water-related requirements on federal licenses.

for example, expressly provides that its purpose is to set water resource policy which will

. . . ensure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington.

Wash. Rev. Code § 90.54.010 (emphasis added).⁵

Under the FPA, however, Congress has determined that hydroelectric facility licensing decisions must be governed by national, not parochial, concerns. The 1986 ECPA amendments provide assurance that the states' perspective on the protection of fish and wildlife will receive careful consideration in FERC licensing proceedings. As shown in Part II of this brief, FERC takes that responsibility seriously and does in fact take into account a wide variety of

⁵Similarly, the Montana Water Use Code embodies that state's policy to provide for the utilization, development, and conservation of the state's waters "for the maximum benefit of its people," Mont. Code Ann. § 85-2-101(3), and Oregon's water resources policy is guided by a legislative finding that utilization and control of the state's water resources is important to the "economic and general welfare of the people of the state and development of this state for the increased economic and general welfare of the people thereof." Or. Rev. Stat. § 536.220(1).

issues and interests which it considers from the perspectives of many parties, including the state agencies charged with the protection of fish and wildlife.

The system has been working the way Congress intended. It cannot continue to do so, however, if each state can unilaterally set the streamflow requirements for every hydroelectric project within its borders.

The Washington Supreme Court's decision transforms what Congress intended to be a limited and specific authority to enforce state water quality standards into a broad and ill-defined unilateral state power to impose virtually any water-related condition. If this and similar decisions by other state courts⁶ are allowed to stand, Congress engaged in a sterile and meaningless exercise when it enacted Section 10(j) of the FPA.

II. The Complex but Coordinated Hydroelectric System in the Pacific Northwest Illustrates the Importance of

⁶See Petition for Writ of Certiorari pp. 16-17.

FERC's Paramount Authority in the Licensing Process
and Why This Court Should Grant Certiorari.

The issue presented by this case will be faced over and over again in individual project licensing proceedings.⁷

However, this case is extremely important for reasons which go beyond the number of individual projects which may be affected. License conditions which are imposed on one hydroelectric project can profoundly affect others as well, including projects in other states. The complex and interrelated nature of the hydroelectric system in the Pacific Northwest, and the detailed coordination involved in the operation of that system, show why and how that is true.

A. The Pacific Northwest Coordination Agreement

At least in the Pacific Northwest, individual hydroelectric projects cannot be considered and evaluated in isolation. Since the early 1960's, the operation of most of the hydroelectric projects in the Pacific Northwest has been closely coordinated to provide substantial benefits to the

⁷See Petition for Writ of Certiorari p. 3, n.3.

public in the Pacific Northwest states and in Western Canada. The parties to the Pacific Northwest Coordination Agreement include fifteen public and investor-owned utilities that own and operate hydroelectric facilities as well as the Departments of Energy and Interior, the Army Corps of Engineers, and the Bureau of Reclamation. The Agreement provides for the coordinated operation of well over a hundred hydroelectric plants, including twenty-one projects owned and operated by the United States government. Because the Bonneville Power Administration is a member of the coordinated system, any change in power production at a single hydroelectric facility affects the price paid for electricity by every ratepayer in the Pacific Northwest and in much of California.

One important impetus for the Coordination Agreement was the Columbia River Treaty between the United States and Canada, signed in 1961.⁸ Pursuant to that

⁸Treaty between Canada and the United States of America relating to the cooperative development of the water
(continued...)

treaty, large storage reservoirs have been constructed in Canada. Those reservoirs contribute to regulation of the flow and provide downstream power benefits at various hydroelectric projects in the United States. The benefits are shared with Canada.

A primary purpose of the Coordination Agreement is to optimize firm power production throughout the Pacific Northwest and, at the same time, to provide for non-power uses of water resources. Under the Agreement each project must be operated within applicable legal and regulatory constraints. The Agreement also implements the Columbia River Treaty with Canada.

Each year the coordinated system utilities, BPA, the Army Corps of Engineers and the Bureau of Reclamation plan the operation of all projects in the system for the next operating year. This planning is done on a system-wide basis as though all projects were under unified ownership and

control. The result is a detailed hydroelectric regulation program which defines the limitations on drafting and refilling of all reservoirs. The benefits of coordination are equitably distributed through a complex contractual arrangement. Daily adjustment and fine-tuning of the coordinated plan are made necessary by many variables, including especially the weather.

Runoff in the region is highly variable and does not occur in the same pattern as do electric power requirements and fish migration requirements.⁹ The system's total storage capacity will accommodate less than half the total annual runoff, even in a below-average year. Thus the benefits of a large portion of the annual runoff must be captured within a short time or be lost forever.

Taking such constraints into account, the coordinated system achieves a delicate balance among utility load

⁸(...continued)
resources of the Columbia River Basin," September 17, 1961, 15 U.S.T. 1555, T.I.A.S. No. 5638, 542 U.N.T.S. 244.

⁹For example, in the Columbia River Basin, monthly mean unregulated streamflows can range from 40,000 cfs in January to 1,240,000 cfs in May, and annual runoff has ranged from 78 to 193 million acre-feet.

requirements, reservoir storage capacity, and streamflow needs.

Each year the coordinated planning process must choreograph, for all of the system's more than 100 projects, the system-wide storage and release of water to provide for regional and international power needs while taking into account, for each project, such things as minimum flow requirements, upper storage limits for flood control and recreation, the need to set aside water for increased streamflows to aid in the downstream migration of fish, spills of water from individual dams to transport juvenile fish around the turbines, maximum outflows, tail water restrictions, and the specific operational constraints of each of the projects.

B. The Importance of FERC's Paramount
Licensing Authority

The result of the process described above is a regional system which is coordinated hydraulically, electrically, contractually, and economically. As a consequence, the terms

of a single project license in the Pacific Northwest can have interstate and even international effects. To the extent that FERC has the final authority to determine the conditions of hydroelectric licenses, there is a single forum in which such potential long-range effects can be considered and balanced. To the extent that individual states can dictate those conditions, the other projects in the system -- including the federal projects -- are at the mercy of individual states acting to protect their local interests.

Minimum flow requirements in particular can have a substantial impact on the ability of the system as a whole to optimize power production. They reduce the system's output and flexibility. Minimum flow requirements affect not only the individual project upon which they are imposed, but potentially every project and utility in the entire coordinated system. Those effects are felt across interstate and international boundaries. If Oregon, Washington, Idaho, Montana, and Wyoming could each impose minimum flow

requirements on local projects, the economic viability of projects hundreds of miles downstream could be disrupted.

Because the Pacific Northwest hydroelectric system impacts many different entities and jurisdictions -- the states and their political subdivisions, the federal government, Canada, and various Indian tribes -- project license proceedings often produce conflict over issues such as flood control, irrigation, recreation, power production, international and Indian treaty rights, and fisheries. The fisheries issue itself frequently creates conflict between upstream and downstream entities. FERC's licensing process, governed by the FPA, provides mechanisms for considering and balancing these widely disparate interests.

A central feature of the FPA is Congress's commitment to coordinated study and comprehensive planning along an entire river system. National Wildlife Federation v. F.E.R.C., 801 F.2d 1505, 1507 (9th Cir. 1986). In the Pacific Northwest an "entire river system" often spans several states and may extend into Canada. The FERC

licensing process can accommodate and coordinate the many interests involved. To the extent that individual states can dictate the conditions of project licenses, the effectiveness of that process will be damaged.

Two Pacific Northwest examples illustrate the kind of multiple-interest accommodation involved in the exercise of FERC's authority.

1. The Wells Dam Example

Wells Dam, operated under FERC License No. 2149,¹⁰ is one of eleven dams located on the main stem of the Columbia River. The Columbia River has its origins in Canada. The volume of its flow in the Pacific Northwest states depends in part upon the operation of Canadian dams and reservoirs. Wells Dam is located in the State of Washington. The dam and its reservoir abut federally-owned lands, tribal lands of the Colville Indian Reservation, and private lands under the jurisdiction of various municipalities

¹⁰Federal Power Commission, Order Issuing License (Major), Project No. 2149, July 12, 1962.

and the State of Washington. Immediately upstream are two federal dams (Chief Joseph and Grand Coulee). Immediately downstream are other mid-Columbia dams. Further downstream the Columbia River becomes the boundary between Washington and Oregon where it is spanned by several federally-owned projects.

The Wells license requires coordination with other facilities, with utilities in both Washington and Oregon, and with the Bonneville Power Administration which markets federal power in the Pacific Northwest. Under the terms of the license FERC can, if necessary, order that coordination.

The license specifically requires fish passage facilities. The Washington Departments of Fisheries and Game, among others, participated before FERC in developing the details of that requirement.

The license also recognizes that the Wells reservoir will encroach upon the tailwaters of the Chief Joseph Dam of the Army Corps of Engineers. It requires the Wells Dam

licensee to reimburse the Corps if that encroachment should interfere with power production.

The license also prescribes how the dam will be operated, for flood control, in conjunction with the federally-owned Dalles Dam downstream, as well as how the dam will use Canadian storage under the Columbia River Treaty for increased streamflow. It requires the licensee to provide power to the BPA federal system for delivery to Canada.

The many competing interests addressed by the Wells Dam license include power production, transmission arrangements, flood control and navigation under the jurisdiction of the Army Corps of Engineers, state and federal agency concerns regarding fish and wildlife, archaeological survey and salvage, recreation, and coordination of the project with the United States Columbia River power system. In addition to the fisheries interests of the State of Washington, the license addresses the interests of other states

in anadromous fish,¹¹ tribal interests in treaty fishing rights, and federal interests in the anadromous and ocean fisheries.

2. The Priest Rapids Dam Example

The history of Priest Rapids Dam provides another example of the importance of FERC's authority. The original Priest Rapids license, issued in 1955, provided for minimum flows which had to be coordinated with releases from a number of upstream dams including two, Grand Coulee and Chief Joseph, which are federally owned. Determination of those original minimum flows had required FERC to balance, in addition to all of the interests described in the discussion of the Wells license, the need to provide enough water for the cooling facilities at the Hanford Nuclear Reservation immediately downstream.

In 1976 nests of salmon eggs downstream from Priest Rapids Dam were harmed during fluctuating flows. The

¹¹In Pacific Northwest rivers, salmon and steelhead trout migrate downstream to the Pacific Ocean where they remain two to four years before returning upstream to spawn in the streams where they were hatched.

affected state fisheries petitioned FERC to amend the Priest Rapids license to increase the minimum flows almost twofold. With the help of FERC's Administrative Law Judges, the licensee and the state fisheries agencies reached several interim agreements to address state minimum flow demands while balancing other competing interests.

Eventually the interested parties, under FERC's auspices, reached a landmark long-term settlement agreement which creates a sliding scale of minimum flows based on how much spawning occurs at various water levels.¹² The ability of Priest Rapids to meet its minimum flow requirements without severe and imprudent reservoir drafts, adversely affecting power production or recreational facilities, depends on releases from upstream federal storage projects. BPA is a party to this settlement and has agreed to provide releases

¹²Setting minimum flow requirements too high can devastate fish populations. Spawning occurs at the edge of a stream in the shallows. The eggs can be exposed and destroyed if the water level was too high during spawning because of high minimum-flow requirements and, for example, was later lowered by drought or other conditions.

from the Chief Joseph Dam to enable Priest Rapids to meet the new minimum discharge requirements. Two local utility districts also agreed to provide compensated reservoir draft at their upstream projects to assist Priest Rapids.

The parties involved in this settlement, which was approved by FERC and arrived at under its auspices, included the Washington Departments of Fisheries and Wildlife, the National Marine Fisheries Service,¹³ the Oregon Department of Fish and Wildlife,¹⁴ BPA, various local utility districts, and three sovereign Indian Tribes (the Yakima, Umatilla and Colville tribes) which have treaty fishing rights and are not, by and large, subject to state jurisdiction.

The disruptive effect of the Washington Supreme Court's decision on FERC's procedures is already being seen. The Washington Department of Ecology's instream flow

¹³Salmon and steelhead trout may be caught in the Pacific Ocean where they mature before returning upriver to spawn.

¹⁴Many of these fish are spawned and caught on the Oregon side of the Columbia River.

regime in this case renders Tacoma's proposed project economically infeasible (Petition for Writ of Certiorari p. 15). A third licensing example from the Pacific Northwest shows how the Washington Supreme Court's decision has disrupted the process of balancing and accommodation.

3. The White River Project -- An Example of the Problem

The White River Project, FERC No. 2449, is an existing project constructed in 1910-11 owned by Puget Sound Power & Light Company ("Puget Power"). Puget Power's license application for the project is currently pending before FERC.

In FERC's environmental assessment its staff preliminarily concluded, pursuant to Section 10(j) of the FPA, that instream flow regimes recommended by federal and state fish and wildlife agencies were inconsistent with the FPA, and proposed an alternative flow regime for the project.¹⁵ It

¹⁵See 57 Fed. Reg. 48212, October 22, 1992, announcing availability of environmental assessment.

estimated that, as compared to the FERC staff proposal, the fish and wildlife agencies' flows would result in approximately \$3,000,000 per year of lost power production during each year of the term of the 40 year license, with very little additional potential benefit to the White River fishery. FERC's determination triggered further efforts "to resolve the inconsistency" under Section 10(j)(2). Puget Power requested that FERC hold an evidentiary hearing.

However, on April 29, 1993 (just weeks after the Washington Supreme Court's decision in this case), the Washington Department of Ecology imposed the fisheries agencies' flow regime as a condition of a Section 401 Certification for the White River Project. As a result, FERC concluded that there would be no point in holding further hearings on the instream flow issues.¹⁶

¹⁶FERC said:

Because no party had suggested that higher minimum flows are needed, and the staff's recommended instream flows are lower than those required in the certification, no purpose
(continued...)

C. Divided Authority Was Not Intended by Congress and Will Not Work.

The kind of accommodation of many competing interests which was accomplished in the Wells Dam license and the Priest Rapids Dam settlement was possible because FERC had ultimate authority over the conditions of the licenses. A state which could, without FERC's consent, unilaterally impose minimum flow requirements on projects within its borders would often have little or no incentive to cooperate in modifying those requirements to accommodate the interests of other states or those of the federal government in connection with its own hydroelectric projects. Other states and other project owners, including the federal government, would not have access to a forum with the

¹⁶(...continued)
would be served by holding an evidentiary hearing on instream flow issues.

Puget Sound Power & Light Company, 64 FERC ¶ 61,045 (July 9, 1993).

authority to insure that their interests were given appropriate consideration.

Congress has never consented to a system of dual authority over questions of instream flow; rather, it has recognized that such a system simply will not function. The Washington Supreme Court was mistaken when it found that very consent, which Congress has refused more than once to grant expressly, in a single, oblique, reference in Section 401(d) to "other appropriate" requirements of state law.

Congress has created a regulatory setting which encourages voluntary accommodations precisely because it places the final authority to determine streamflow requirements where that authority belongs: at the federal level. Experience has shown that even where extremely complex demands are placed upon that regulatory system, as in the Pacific Northwest, the system works. It cannot continue to do so effectively, however, under the rule of law announced in this case by the Washington Supreme Court.

CONCLUSION

For the reasons discussed above and in the petition, the Court should issue its writ of certiorari to the Washington Supreme Court.

Respectfully submitted,

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APPENDIX

THE PACIFIC NORTHWEST UTILITIES JOINING

IN THIS BRIEF AS AMICI CURIAE

I. PacifiCorp

PacifiCorp, dba Pacific Power & Light Company and Utah Power & Light Company, is an investor-owned electric power utility based in Portland, Oregon, and Salt Lake City, Utah. PacifiCorp supplies power to a variety of residential, commercial, and industrial customers. Its service areas cover parts of seven western states and include several million people.

PacifiCorp owns and operates 54 hydroelectric facilities in seven states, including seven facilities in Washington. These facilities have a combined nominal generating capacity of slightly more than 1,000 megawatts ("Mw"), of which about half is generated by the Washington facilities. Hydroelectric power constitutes approximately 15

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percent of PacifiCorp's total generating capacity, the remainder of which consists primarily of coal-fired generating plants. Because of the ability to adjust hydroelectric power generation rapidly, PacifiCorp relies heavily on its hydroelectric facilities to respond to daily, weekly, and seasonal fluctuations in power demand. In addition, PacifiCorp has responded to short-term load fluctuations through capacity purchases from the Bonneville Power Administration (BPA). The bulk of the capacity purchased through BPA is generated by hydroelectric facilities.

Nearly all of PacifiCorp's hydroelectric facilities, and all of its large facilities, are licensed by the Federal Energy Regulatory Commission. Many of these licenses will expire within the next few years and will require state certifications under section 401 of the federal Clean Water Act.

II. The Public Generating Pool and Its Members

The Public Generating Pool is a group of publicly-owned generating utilities located in the Pacific Northwest: City of Seattle, City Light Department (Seattle City Light);

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the City of Tacoma, City Light Department (Tacoma City Light); Chelan County Public Utility District (PUD); Cowlitz County PUD; Douglas County PUD; Grant County PUD; the Eugene Water & Electric Board (EWEB); and the Pend Oreille PUD.

The PGP utilities own hydroelectric facilities, licensed by FERC under the FPA, that have total nameplate ratings of nearly 700 Mw. These utilities serve nearly six hundred thousand retail customers. They are all interconnected through the BPA. As signatories to the Pacific Northwest Coordination Agreement, they coordinate their operations with the other privately and publicly-owned generating utilities in the Pacific Northwest as well as with BPA, the Corps of Engineers and the Bureau of Reclamation.

A. Seattle City Light

Seattle City Light owns four hydroelectric projects which have a total nameplate rating of 1200 Mw: Boundary, the Skagit Projects (Ross, Diablo and Gorge), Newhalem Creek, and Cedar Falls. It also purchases from five other

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hydroelectric projects, and has a FERC license for its project on the South Fork of the Tolt River, License No. 2459.

Seattle City Light's Skagit Project, License No. 553, includes Ross Dam whose reservoir is partially in British Columbia and is fed by Canadian streams. In addressing license revisions for that project, FERC has not only considered minimum flows suggested by the Washington Departments of Fisheries and Game, but has also required Seattle City Light to address British Columbia Basin matters and to consult with the International Joint Commission. Cf. Federal Power Commission, Opinion No. 808, July 5, 1977.

B. Tacoma City Light

Tacoma City Light has three federally-licensed hydroelectric projects which have a total rating of approximately 700 Mw. It also purchases from other hydroelectric facilities. Its projects involve rivers with high spring runoffs when compared to reservoir storage capacity. In these licenses in particular, FERC has had to balance federal Army Corps of Engineers flood control concerns with

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State of Washington instream flow recommendations for fish migration as well as with power production and other concerns.

C. Chelan County PUD

Chelan County PUD holds three federal licenses for hydroelectric facilities with a total rating of 1884 Mw, including two on the Columbia River: Rock Island and Rocky Reach. The Columbia River flows from British Columbia through Washington, then forms the border between Oregon and Washington until it empties into the Pacific Ocean. There are federally and nonfederally owned dams on the Columbia River and on its chief tributary, the Snake River. The Snake River originates in Wyoming, flows through Idaho, then forms the border between Idaho and Oregon and between Washington and Idaho before joining the Columbia River in Washington.

D. Cowlitz County PUD

Cowlitz County PUD holds the license for the Swift Project No. 2, License No. 2213, on the Lewis River. The

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project has a rating of 70 Mw and is operated in close conjunction with three nearby projects owned by the Pacific Power & Light Company. This license has provisions for federal navigation and flood control activities by the Army Corps of Engineers.

E. Douglas County PUD

Douglas County PUD owns the Wells Dam on the Columbia River. Wells has a rating of 820 Mw. The Wells license is described at pages 21-24 of this brief.

F. Grant County PUD

Grant County PUD owns two large federally-licensed hydroelectric facilities, Priest Rapids and Wanapum, on the Columbia River. Priest Rapids and Wanapum are rated at 788.5 and 880.4 Mw, respectively. The history of the Priest Rapids license is described at pages 24-26 of this brief. Grant County PUD also purchases from several small hydroelectric projects.

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G. Eugene Water & Electric Board

The Eugene Water & Electric Board has three federally licensed projects on the McKenzie River in Oregon with a nameplate rating of 111.5 Mw. In 1973, the State of Oregon acknowledged FERC's authority to set minimum flows on this stream when it asked EWEB to request that FERC modify the minimum flow requirements under EWEB's federal license No. 2496 at Leaburg Dam, which was done and approved by FERC.

H. Pend Oreille PUD

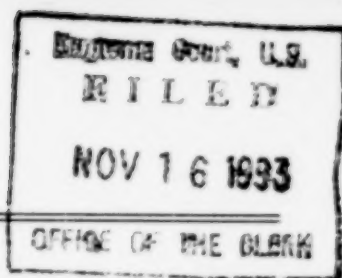
Pend Oreille PUD owns the 64 Mw Box Canyon Project (FERC License No. 2042) on the Pend Oreille River in Washington. It also owns the Sullivan Creek Project (FERC Project No. 2225) which it operates under the Pacific Northwest Coordination Agreement, to provide storage but no generation of its own. Pend Oreille PUD also has capacity purchase rights from Seattle City Light's Boundary Project.

III. Puget Sound Power & Light Company

Puget Sound Power & Light Company is the largest investor-owned electric utility in the State of Washington. It serves 1.5 million people within a 4,500 square mile service area.

Puget Power is highly dependent upon hydroelectric power to serve the needs of its almost 800,000 customers. In 1992 more than 50 percent of Puget Power's load was served from hydroelectric resources: company-owned hydroelectric facilities, purchases under long-term contracts from hydroelectric projects on the mid-Columbia River owned by PUDs, and other purchases of hydroelectric power. Puget Power currently has two federally-licensed projects, the Baker River and Snoqualmie Falls projects. It also has four hydroelectric license applications pending before FERC. One of those pending applications is for a new project (Thunder Creek), and three propose expansion at existing projects (White River, which is discussed at pages 27-29 of this brief, Snoqualmie Falls and Nooksack Falls).

No. 92-1911



In The
Supreme Court of the United States
October Term, 1993

PUD NO. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY, DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of The State Of Washington

JOINT APPENDIX

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Petition For Certiorari Filed June 1, 1993
Certiorari Granted October 4, 1993

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RELEVANT DOCKET ENTRIES

POLLUTION CONTROL HEARINGS BOARD

January 28, 1987 - Cross Motion for Summary Judgment filed with the Pollution Control Hearing Board

January 28, 1987 - Affidavit of Ken Bruya

January 28, 1987 - Affidavit of Brad Caldwell

January 28, 1987 - Affidavit of Hal Beecher

June 29, 1987 - Pre-Hearing Order of Pollution Control Hearing Board

February 4, 1988 - Appellant's Motion to Supplement the Record as to Economic Feasibility Information, with Affidavit of Garth Jackson

THURSTON COUNTY SUPERIOR COURT

February 24, 1989 - Petition for Review of the Decision of the Pollution Control Hearings Board

March 1, 1989 - Cross Petition for Review of Pollution Control Hearing Board

January 3, 1990 - Motion to Establish Briefing Schedule and Date for Argument

February 27, 1990 - Notice of Hearing

November 30, 1990 - Memo in Support of City and PUDS Cross-Appeal on the Jurisdictional Issue

November 30, 1990 - Trial Brief of the Department of Ecology, Fisheries and Wildlife

December 17, 1990 - Response Brief of Department of Ecology, Fisheries and Wildlife

December 20, 1990 - City & PUD's Reply Brief on the Jurisdictional Preemption Issue

March 2, 1991 - Motion for Expedited Hearing Date

May 10, 1991 - Memo Opinion of Judge Fuller

June 6, 1991 - Notice of Appeal to Supreme Court

June 14, 1991 - Copy of Letter from Supreme Court to Counsel

June 14, 1991 - Notice of Supreme Court No. 58272

June 26, 1991 - Designation of Clerk's Papers & Exhibits

July 25, 1991 - Notice of Hearing - Special Setting

July 29, 1991 - Memo of PUD and City in Support of Their Proposed Findings of Fact, Conclusions of Law & Final Judgment

August 14, 1991 - Findings of Fact & Conclusions of Law and Final Judgment

April 2, 1992 - Letter from Supreme Court Clerk

SUPREME COURT OF THE STATE OF WASHINGTON

June 12, 1991 - Notice of Appeal

June 26, 1991 - Statement of Grounds for Direct Review

July 19, 1991 - Clerk's Papers - 2 Volumes Received From Thurston County

August 26, 1991 - Letter establishing Briefing Schedule

August 26, 1991 - Designation of Clerk's Papers - Supplemental of Clerks

September 12, 1991 - Answer of Respondents to Statement of Grounds for Direct Review

September 12, 1991 - Clerk's Papers - 1 Volume pages 284-332 received from Thurston County Clerk

October 14, 1991 - Proposed Report of Proceedings - Notification That 1 Vol. of transcript was filed in Thurston County Clerk's Office

November 25, 1991 - Notation Order on Motions Establishing Briefing Schedule

January 27, 1992 - Appellant's Brief

February 27, 1992 - Respondent's Brief

March 13, 1992 - 1 Box and 3 Charts of Administrative Record Received from Thurston County

April 28, 1992 - Motion for Amicus Brief

April 30, 1992 - Appellant's Reply Brief

May 1, 1992 - Court Ruling on Motions - (Letter Form) Granting Motion to File Amicus Brief

May 18, 1992 - Motion to File Amicus Curiae Brief on Behalf of 14 State, Regional and National Conservation Groups

May 18, 1992 - Amicus Curiae Brief

May 18, 1992 - Amicus Curiae Brief of Behalf of Conservation Amici

May 18, 1992 - Order on Motions

June 8, 1992 - Answer of Utilities Amicus Curiae Brief

June 9, 1992 - Notation Order on Motions

June 9, 1992 - Affidavit of Mailing Answer to Amicus Curiae Brief

June 25, 1992 - Set for Hearing - entered June 25, 1992 En Banc 3rd Case

March 15, 1993 - Additional Authorities

April 1, 1993 - Opinion

May 3, 1993 - Mandate

May 5, 1993 - Administrative Record - returned to Thurston County

June 8, 1993 - Supplemental Pleadings - Notice of Filing Petition for Cert.

BEFORE THE POLLUTION CONTROL
HEARINGS BOARD
STATE OF WASHINGTON

| | | |
|------------------------|---|-----------------|
| PUD NO. 1 OF JEFFERSON |) | |
| COUNTY, and CITY OF |) | |
| TACOMA DEPARTMENT OF |) | PCHB No. 86-118 |
| PUBLIC UTILITIES, |) | |
| Appellant, |) | AFFIDAVIT OF |
| |) | KENNETH J. |
| |) | BRUYA |
| v. |) | |
| STATE OF WASHINGTON, |) | |
| DEPARTMENT OF ECOLOGY, |) | |
| Respondent. |) | |
| |) | |

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, Kenneth J. Bruya, being first duly sworn upon oath, depose and say:

1. I am over 18 years of age and competent to testify herein.

2. I am employed by the Washington State Department of Fisheries as a Fisheries Biologist. Previously, I was employed by the Fisheries Research Institute, University of Washington, as a Fisheries Biologist. I received a Bachelor of Science Degree from the University of Washington in Fisheries Biology in 1973. I received a Masters of Science in Fisheries Biology from the University of Washington in 1981.

3. I worked with Brad Caldwell and other agency representatives on the minimum instream flow for the bypass reach of the Elkhorn hydroelectric project. The project is proposed to be located on the Dosewallips River.

4. I am well acquainted with the IFIM methodology for determining an appropriate minimum instream flow for a given stream.

5. The minimum instream flow that was imposed by the Department of Ecology for the Elkhorn project in a water quality certification dated June 11, 1986, is reasonable and appropriate. These flows are established to maintain habitat for anadromous fish. These flows are necessary to protect salmon runs in the Dosewallips River. The bypass reach is utilized by several species of salmon for spawning, incubation, and juvenile rearing.

6. The Department of Fisheries supports the flow that was imposed by the Department of Ecology for the Elkhorn project.

/s/ Kenneth J. Bruya
KENNETH J. BRUYA

SUBSCRIBED AND SWORN TO before me this 28th day of January, 1987.

/s/ Beverly J. Jolley
NOTARY PUBLIC in and for
the State of Washington.
My commission expires.
12/21/89.

BEFORE THE POLLUTION CONTROL
HEARINGS BOARD

STATE OF WASHINGTON

| | | |
|------------------------|---|-----------------|
| PUD NO. 1 OF JEFFERSON |) | |
| COUNTY, and CITY OF |) | |
| TACOMA DEPARTMENT OF |) | PCHB No. 86-118 |
| PUBLIC UTILITIES, |) | AFFIDAVIT OF |
| Appellant, |) | BRAD |
| |) | CALDWELL |
| v. |) | |
| STATE OF WASHINGTON, |) | |
| DEPARTMENT OF ECOLOGY, |) | |
| Respondent. |) | |
| _____ |) | |

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, BRAD CALDWELL, being first duly sworn upon oath, depose and say:

1. I am over 18 years of age and am competent to testify herein. All of the following testimony is from my own personal knowledge.

2. I am employed by the Department of Ecology as a Fish Biologist. I work in the Department's Water Resources Program. My specialty is the setting of appropriate minimum instream flows utilizing the standard "Instream Flow Incremental Method" (IFIM). I work closely with other resource agencies in arriving at a suggested minimum instream flow.

3. I attended college at Florida Southern College, where I received a Bachelor of Science degree in Biology. I received my Masters Degree from Colorado State University in Fisheries Biology.

4. After I received my Masters Degree, I worked for the "Instream Flow Group" for one and one-half years. This group originated the IFIM and is nationally recognized for its expertise in the IFIM process. I taught courses for the Instream Flow group in field technique and computer analysis. I have also worked as a private consultant and for the Washington State Department of Fisheries as an instream flow specialist.

5. I worked extensively on the minimum instream flow for the bypass reach of the proposed Elkhorn project, utilizing the IFIM methodology. The project itself would consist of a diversion weir, or a small dam, to be located at river mile 13.8, just outside the Olympic National Park. The weir would divert up to 600 cubic feet per second of river water from the natural channel to a penstock, or large pipe. The diverted water would run downstream at a relatively constant elevation, while the river drops steeply below. Then, approximately 1.2 miles downstream, the penstock would drop almost vertically to the powerhouse. The falling water would turn a turbine in the powerhouse generating electrical energy. The river water would then be returned to the channel. The bypass reach is the stretch of river between the diversion weir and the powerhouse. It was this stretch of river upon which I concentrated in setting the minimum instream flow in question.

6. The Dosewallips River is a free flowing, beautiful stream which drains a large portion of the eastern Olympic mountain range. The west fork drains the glaciers and snowfields of Mt. Anderson. The main fork drains the slopes of Mt. Hayden and Mt. Fromme. The upper portion of the river runs entirely through the Olympic National Park. The proposed Elkhorn project would be located just outside the park boundary.

7. The Dosewallips is the second largest stream flowing into Hood Canal. It is a very important stream for salmon and steelhead. The Dosewallips supports some of the largest runs of salmon and steelhead in the entire canal. Both winter and summer steelhead utilize the Dosewallips. Chinook, Coho, and Chum salmon are also found in the river. The Dosewallips supports the largest run of Pink Salmon of any stream flowing into the Canal.

8. The bypass reach may be utilized by all of these types of salmon and steelhead. It is utilized as a spawning area and as a rearing area for juveniles. For this reason, a minimum instream flow is absolutely necessary for the bypass reach. In the absence of a minimum flow, the Elkhorn project could dewater the pypass reach for much of the year, rendering it unfit for fish. It is impossible to quantify what impact this would have on the steelhead and salmon runs in the Dosewallips, but a detrimental impact, due to loss of habitat, would almost certainly occur.

9. A water quality certification was issued for the Elkhorn project on June 11, 1986. A copy is attached as

Exhibit 1 hereto. A condition was included in the certification which required the maintenance of a minimum instream flow in the bypass reach for the project. The minimum flow required is the one arrived at by me and other agency representatives using the IFIM methodology.

10. In arriving at this flow, I worked closely with representatives of the Department of Fisheries, Department of Game, U.S. Fish and Wildlife Service, and the Point No Point Treaty Council. These agency representatives are all trained in the IFIM process and are very experienced in utilizing this method. The instream flow in question was agreed to by the agencies listed above as appropriate and necessary.

11. The instream flow that was imposed as a condition in the water quality certification is a very modest one. It is, at least, a ninety (90) percent exceedance flow. In other words, the natural flow in the stream will exceed the minimum flow 90 percent of the time. During some months of the year, the minimum flow will be a 98 percent exceedance flow. Therefore, in my opinion, the minimum flow requirement is a reasonable, in fact, minimal device which will protect the Dosewallips and its fish runs and which will allow the City to construct and operate the Elkhorn Project.

/s/ Brad Caldwell
BRAD CALDWELL

SUBSCRIBED AND SWORN TO before me this 28
day of January, 1987.

/s/ Patricia J. Korosec
NOTARY PUBLIC in and for
the State of Washington.
My commission
expires 1-16-90

BEFORE THE POLLUTION CONTROL HEARINGS
BOARD STATE OF WASHINGTON

| | | |
|---------------------|---|-----------------|
| PUD NO. 1 OF |) | |
| JEFFERSON COUNTY, |) | |
| and CITY OF TACOMA |) | PCHB No. 86-118 |
| DEPARTMENT OF |) | |
| PUBLIC UTILITIES, |) | AFFIDAVIT OF |
| |) | HAL BEECHER |
| Appellant, |) | |
| v. |) | |
| STATE OF |) | |
| WASHINGTON, |) | |
| DEPARTMENT OF |) | |
| ECOLOGY, |) | |
| |) | |
| Respondent. |) | |
| <hr/> | | |
| STATE OF WASHINGTON |) | |
| |) | ss. |
| COUNTY OF THURSTON |) | |

I, HAL BEECHER, being first duly sworn upon oath,
depose and say:

1. I am over 18 years of age and competent to testify herein.

2. I am employed by the Washington State Department of Game. I am an instream flow biologist with the Habitat Management Division of the Department of Game. I have been employed by the Department of Game since 1979.

3. I received a Bachelor of Arts Degree in Biology from Middleberry College in 1970. I received a Masters of Science in Marine biology from the University of West Florida in 1973. I received a Ph.D. in Stream Ecology and Ichthyology from Florida State University in 1979. I am very experienced with various instream flow methodologies. I am familiar with the IFIM methodology.

4. I am familiar with the proposed Elkhorn hydroelectric project to be constructed on the Dosewallips River. I worked closely with Brad Caldwell, Jean Caldwell, and representatives of other resource agencies in developing a suggested instream flow for the bypass reach of the Elkhorn project. That flow was imposed as a condition in a water quality certification issued by the Department of Ecology for the Elkhorn project on June 11, 1986.

5. The suggested flow is absolutely necessary for the maintenance of winter and summer steelhead runs in the Dosewallips River. The purpose of the flow is to maintain habitat for anadromous fish runs, and possible for resident game fish. The Washington State Department of Game supports the minimum instream flow that was required by the Department of Ecology in the water quality certification previously mentioned. The flow is reasonable and, in my opinion, necessary to the maintenance of anadromous fish runs in the Dosewallips River.

/s/ Hal Beecher
HAL BEECHER

SUBSCRIBED AND SWORN TO before me this 28th
day of January, 1987.

/s/ Beverly J. Jolley
NOTARY PUBLIC in and for
the State of Washington.
My commission expires.
12/21/89

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A)
SECTION 401 WATER)
CERTIFICATION)
GRANTED BY)
DEPARTMENT OF)
ECOLOGY TO)
PUD NO. 1 OF)
JEFFERSON COUNTY)
AND CITY OF TACOMA,)
DEPARTMENT OF)
PUBLIC UTILITIES,)
Appellant,)
v.)
STATE OF)
WASHINGTON,)
DEPARTMENT OF)
ECOLOGY,)
Respondent.)

PCHB No. 86-118
PRE-HEARING ORDER

A pre-hearing conference was held before William A. Harrison, Administrative Appeals Judge for the Pollution Control Hearings Board on June 25, 1987, in Lacey, Washington.

Appellant was represented by Mark L. Bubenik, Assistant City Attorney. Respondent was represented by Jay J. Manning, Assistant Attorney General.

The following issues were set forth:

I

ISSUES

1. Whether the specific base flows imposed by the Department of Ecology in this instance are appropriate for the preservation of the fishery resource and related values?

2. What quantity and type of fish inhabit the waters to be affected by the base flows described by the Department of Ecology?

II

WITNESSES

Appellant's Witnesses:

1. Dwayne Simons - City Engineer
2. Phil Hilgert - Hosey and Associates, Biologist
3. Dr. Eugene Welch - University of Washington Professor
4. Al Solonsky - Hosey and Associates
5. Eileen Garland - Hosey and Associates, Environmental
6. Paul Svoboda - City Biologist
7. Ken Bovee - U.S. Fish and Wildlife Service

Respondent's Witnesses:

1. Brad Caldwell - DOE
2. Hal Beecher - DOG
3. Elaine Rybak - USFS
4. Ken Bruya - DOE

5. Steve Ralph - Point No Point Treaty Council
6. Walt Bergstrom - DOE

III

EXHIBITS

1. License Application to the Federal Energy Regulatory Commission dated March 17, 1986.

2. Instream Flow Study by Hosey and Associates.

3. Washington Department of Fisheries Fish Siting Records for By-pass Reach.

4. Methodology for Determining Puget Sound Coho Escapement Goals, Escapement Estimates, 1977 Pre-season Run Size Prediction and In-season Run Assessment, WDF Technical Report No. 28, April 1977.

5. Aquatic Habitat and Vegetation Survey of the Dosewallips River Floodplain, Shapiro and Associates, October 1982.

6. MEeting Record from interagency meeting held on September 7, 1983 (IFIM study scoping).

7. Record of interagency site visit conducted on September 8-9, 1983 (IFIM study scoping).

8. Record of interagency site visit conducted on September 20-21, 1983 (IFIM study scoping).

9. Letter from Jay Laughlin, Hosey and Associates to agencies dated January 12, 1984 (requesting letters of support for preliminary permit extension - includes summary of instream flow work to date).

10. Record from interagency meeting held on February 21, 1985 (review of IFIM field data and discussion of hydraulic modeling approach).

11. Letter from John Leder and Phil Hilgert to agencies dated March 7, 1985 (comments on hydraulic model).

~~12. Record from interagency meeting held on May 30, 1985.~~

13. Letter from Ken Bovee of the Instream Flow Group.

14. Letter from Phil Hilgert to Doug Ruston, Washington Department of Ecology dated August 1, 1985 (comments on IRPP).

15. Record from interagency meeting held on January 14, 1986 (discussed applicants revised flow proposal).

16. Letter from Steve Ralph, Point No Point Treaty Council to Phil Hilgert, Hosey and Associates dated March 23, 1986 (rejecting applicants proposed flow regime and submitting the agency proposal).

17. Letter from Dave Stout, U.S. Fish and Wildlife Service to Phil Hilgert, Hosey and Associates dated March 28, 1986 (rejecting applicants proposed flow regime and submitting the agency proposal).

18. Letter from Mark Grandstaff and Hal Beecher, Washington Department of Game to Phil Hilgert, Hosey and Associates dated February 5, 1986 (rejecting applicants proposed flow regime and submitting the agency proposal).

19. Instream Resources and Water Allocation Program review dated February 1987.

Respondent's Exhibits:

Respondent did not identify exhibits at this conference.

The parties shall file and exchange their lists of witnesses and exhibits on or before November 1, 1987.

IV

BRIEFS

The parties are not required to file briefs in this matter. If parties elect to do so, however, all briefs shall be filed one week before hearing, which deadline is now December 8, 1987.

V

EFFECT OF THIS ORDER

The above statement of issues (Part I) shall control the subsequent course of the proceedings unless modified for good cause by subsequent order of this Board. WAC 371-08-140. The above statement of witnesses (Part II and III), when filed shall control the subsequent course of the proceedings unless changed by notice adequate to prevent prejudice to both parties.

VI

SITE VISIT

The Department of Ecology has requested the Board to visit the site provided that weather conditions allow at the time of hearing. In the event that weather conditions do not allow the parties will explore the possibility of

cooperatively producing a video tape showing those places and things that will be referred to in testimony.

DATED this 29th day of June, 1987.

POLLUTION CONTROL
HEARINGS BOARD

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

BEFORE THE POLLUTION
CONTROL HEARINGS BOARD
STATE OF WASHINGTON

| | | |
|-------------------------|---|-----------------|
| CITY OF TACOMA, et al., |) | |
| Appellants, |) | |
| vs. |) | PCHB No. 86-118 |
| STATE OF WASHINGTON |) | |
| DEPARTMENT OF |) | |
| ECOLOGY, et al., |) | |
| Respondents. |) | |

TRANSCRIPT OF PROCEEDINGS

DAY ONE

December 15, 1987

Lacey, Washington

Lisa Alger
Registered Professional Reporter
GENE BARKER & ASSOCIATES
406 Security Building
Olympia, Washington 98501
(206) 943-2693

* * *

[28] Q Mr. Hilgert, could you briefly describe the hydroelectric development process?

A What we are really looking at is when someone decides they want to build a hydropower project they

apply for a license application from the Federal Energy Regulatory Commission, Federal Government. The Government gives them a permit to study a particular site, lock in rights to that site for a period of three years. During that preliminary permit phase you need to develop the information in order to try and assess impacts. This is the period where you really start working closely with the various Fish and Wildlife Service Agencies, tribes and develop the environmental studies. You then prepare a draft license application that identifies the resource, your proposed project, any alternatives, alternative configurations for your project and what you perceive to be the impacts associated with the development.

A draft of the application goes out to the agencies, they have a period of time to look at the draft, and then they send their comments back to you and you revise the draft or respond to their comments and send a revised license application and the agencies' comments and any comments you have, send the whole thing [29] off to the FERC, the Federal Energy Regulatory Commission, they look at it and they generally try and get an application where agreements are all worked out. They like to see things all finalized mitigation plans, if necessary. Their responsibility is to arbitrate in case you have a disagreement between the applicant and the agencies.

Frankly, they don't like to try to get into that. They find they have problems trying to arbitrate because then you have both sides fighting against you. They will generally send the application back and say why don't you guys work it out for a little bit longer. They will often request additional information as an incentive to try and get the applicant and the agencies to work things out. If

all else fails, they either accept or reject the license application and they make an independent assessment of what they think the project should go through, and any mitigation they feel is necessary.

It's a process that a preliminary permit takes three years. The license, once it goes in, can take from anywhere to two to five years, depending how long it sits back and defers, and the license is issued and you have four years to start construction.

Q I'm showing you what's marked as Exhibit A-4. Would you [30] please identify this document?

A This is the application for the Elkhorn hydroelectric project submitted to the FERC in March of '86. It contains the application, agency comments, our response to those comments, notice of deficiencies. If you send an application often times when you start the process and when you finally send the thing in, sometimes FERC rules will change or you'll forget a certain portion that they may be looking at, and they will send you a deficiency letter and say well, you didn't tell us how much this is per item cost.

* * *

BEFORE THE POLLUTION
CONTROL HEARINGS BOARD
STATE OF WASHINGTON

| | | |
|-----------------------------|---|-----------------|
| PUD NO. 1 OF JEFFERSON |) | |
| COUNTY and CITY OF TACOMA, |) | |
| DEPARTMENT OF PUBLIC |) | |
| UTILITIES, |) | |
| Appellants, |) | |
| vs. |) | PCHB NO. 86-118 |
| DEPARTMENT OF ECOLOGY, |) | |
| DEPARTMENT OF WILDLIFE, and |) | |
| DEPARTMENT OF FISHERIES, |) | |
| Respondents. |) | |

TRANSCRIPT OF PROCEEDINGS

DAY TWO

December 16, 1987

Lacey, Washington

Bibiana D. Carter
Registered Professional Reporter
GENE BARKER & ASSOCIATES
406 Security Building
Olympia, Washington 98501
(206) 943-2693

* * *

[149] Q. Mr. Beecher, could you state your full name and spell it for the record?

A. My name is Hal A. Beecher, H-a-l B-e-e-c-h-e-r.

Q. Mr. Beecher, by whom are you employed?

A. I am employed by the Washington Department of Wildlife.

Q. And how long have you have been with the Department of [150] Wildlife?

A. I have been with the Department of Wildlife, formerly the Department of Game, since the fall of 1979, approximately eight years.

Q. What's your current position?

A. My current position is technical services program manager.

Q. Could you tell us what your usual job duties are?

A. One of my job duties is instream flow biologist and instream flow expert for the department. I also am in charge of - I supervise people that work with habitat evaluation procedures, mitigation banking, wetlands, Puget Sound Water Quality Authority and - well, a few other related things.

Q. In the packet of exhibits in front of you, is your resume included as Exhibit R-7?

A. Yes it is.

Q. Using that exhibit as you need to, would you please briefly describe your educational background and employment history?

A. I have a bachelor's, master's and PhD in biology and I have worked for the Department of Wildlife for about eight years working primarily on instream flows. I have also worked for The Nature Conservancy as an aquatic ecologist and as a consultant in stream ecology and bird ecology.

Q. Have you had any specific training with regard to the [151] instream flow incremental method?

A. Yes, I have. I have taken several of the short courses that the Instream Flow Group has provided, both here in Washington and also in Fort Collins, Colorado.

Q. Have you actually performed IFIM studies?

A. Yes, I have. I performed one IFIM study, really the entire study, taking a lead on it myself and doing all the fieldwork and computer work, and everything, on Snow Creek which is on the Olympic Peninsula. I have been involved in many other studies.

Q. Have you reviewed other IFIM studies that have been -

A. Yes. I have reviewed virtually all the IFIM studies that have been conducted for small hydroelectric projects, for other types of projects in the state of Washington, since probably '79.

Q. How did you first get involved with the Elkhorn project?

A. I was first involved with the Elkhorn project when in 1982, early '82, when my job duties were to be the - I was responsible for being the Department of Wildlife - or Department of Game then - representative for mitigation for hydroelectric projects on the Olympic Peninsula and also parts of the Western Cascades.

Q. Would you please run through your involvement with the project generally?

A. Yes. As I mentioned, my involvement began in early 1982 [152] when I requested that the Attorney General's Office intervene on behalf of the Department of Game in this hydro project. In the end of 1982 I visited the site with the project proponent and its consultant. Let's see. In early 1983, March, I had some correspondence with the consultant regarding steelhead usage of the bypass in which I had obtained information that steelhead did in fact use the bypass reach.

Q. Let me ask you about that specifically. In your opinion, do steelhead use the bypass reach?

A. Yes, they do.

Q. Would you tell us how you know that?

A. I have observed juvenile steelhead in the bypass. I have been told by the proponent's consultant that they have been observed, adult steelhead, in the bypass. I have talked to the Olympic National Forest, some Olympic National Forest personnel, and also Parks personnel also regarding their evidence that steelhead are in the Dos-wallips immediately upstream from the bypass and, therefore, must have gone through the bypass reach to get there.

Q. Rather than go through all of the meetings that you went to, is it fair to say that you attended the majority of the meetings that were held regarding the Elkhorn project?

A. Yes, it is.

[153] Q. Have you ever been to the site?

A. Yes, I have.

Q. Have you ever snorkeled the stream?

A. Yes, I have.

Q. Would you tell us what that means and what is involved in snorkeling?

A. We got in wet suits, masks, snorkels, and vigorously climbed, scrambled from the vicinity of the proposed intake down to Elkhorn Campground, and during that time, when we had time, I stopped and looked for fish and looked at habitat. And one of the purposes of this trip was to get an idea of the overall conditions, habitat conditions in the bypass, relative abundance of different habitat types such as pools, riffles, cascades, waterfalls, boulders, so to select the site where the IFIM study could be conducted.

Q. I would like you to attempt if you can to characterize the bypass reach as habitat for steelhead. Is it poor, medium, good? Could you characterize it in that nature?

A. It appears to me to be - to have a lot of good rearing habitat. Its pools, a lot of plunge pools and boulder chutes.

Q. What is a plunge pool?

A. A plunge pool is a pool at the base of a waterfall which can be a small waterfall of only a foot or two or a large [154] waterfall. And in my experience with a variety of streams around the state of Washington, I would say that this is relatively good steelhead, particularly good steelhead-rearing habitat. There is only a modest amount of spawning habitat. It is not the abundance of spawning habitat that you see in some other, what I would call, more typical Puget Sound streams.

Q. We have had a lot of testimony in this case regarding whether or not this bypass reach is spawning limited or rearing limited. Do you know whether the bypass reach is spawning limited or rearing limited?

A. No, I don't.

Q. Do you have an opinion on that matter?

A. I have an opinion that there is certainly the possibility, a very real possibility, that it could be spawning limited, and that there is some special circumstances that make it more likely to be spawning limited than the typical Puget Sound stream.

Q. Could you explain what those characteristics are or what it was that you saw that formed that opinion?

A. One factor is that there are canyon walls, bed-rock walls that come down, and the stream channel does not spread out into a floodplain. Once the stream channel ends, it pretty much - the bank goes steeply uphill.

Q. Mr. Beecher, I am sorry. I got a little bit out of order [155] and I definitely want to come back to where we are, but before you do that could you explain what

those two terms mean, rearing limited and spawning limited?

A. Those two terms, they imply that there is one factor – that one or the other factor is the factor that limits how much production of steelhead, or whatever, salmonid species, or other species you might be interested in, occurs.

I have some concerns about those particular terms in the implications that they are the one and only factors. There is a lot of work and I think a lot of opinion among researchers in stream ecology that it's an oversimplification to say that there is one factor that limits production, that in fact there are many things which, if they could be changed, might produce a change in production.

Q. Okay. Given that caution, can you go on and tell us what those terms mean?

A. Spawning limited would mean that the amount of production is proportional to the amount of spawning that can take place and presumably to the amount of spawning habitat that's available. And that changes in other factors such as rearing would not affect production.

Likewise, rearing limited implies that the amount of rearing habitat that is available is going to control the [156] amount of production, and that changes in other factors do not affect the amount of production.

Q. Okay. Mr. Hilgert testified that there is a general assumption on behalf of the agencies and biologists generally that Puget Sound streams are rearing limited. Would you agree that there is that general assumption?

A. I think there is that general assumption. There are some qualifiers there. There are some qualifiers but, yes, that is a widely-held assumption, again, generally, for Puget Sound streams.

Q. Okay. And you testified just a minute ago that in your opinion that assumption may not hold true for the bypass reach.

A. That's correct.

Q. And could you go ahead then and get back to where you were and tell us what it is about the bypass reach that leads you to believe that that general assumption may not be true?

A. All right. One factor about the bypass reach is that there is not a lot of spawning habitat, and one of the reasons is because it is a confined bedrock channel with gravel accumulations in portions, but it is not, as in the typical Puget Sound stream and the lower Dosewallips as an example of that, where you have a broad floodplain, that the entire channel is gravel and is generally suitable to [157] some extent for spawning. That is not the case in the bypass reach. Just patches of spawnable habitat. It's much less, much smaller ratio of spawnable habitat to total area of the bypass reach.

Another factor is that the bypass reach is very close to the upper limits of accessibility for anadromous fish. Now, we are concerned about seeding of a reach with juveniles. If you want to get a fish to rear in a reach, first you've got to have fish have eggs introduced into that region, either there or upstream from it. Well, there are very few eggs that are introduced upstream of it because

there is a very - you know, you are very close to the upper limits of fish accessibility. So there is very few fish, fry, that are going to trickle down into this area to seed any area, so it's going to be very important to insure that all the habitat, all the rearing habitat is occupied, you are going to have to get fish in there in the first place. Well, the only way you get fish in there is either by spawning fish or possibly by planting. But planting in that particular case is not very feasible, again, because of the terrain.

Q. Are there any other factors that lead you to believe that this bypass reach may be spawning limited?

A. I think those are really the two primary factors that lead me to think that it could be.

[158] Q. In the final analysis, however, are you in the same boat with Mr. Hilgert, that you simply don't know whether it's rearing limited or spawning limited?

A. That's right, I am. I don't know.

Q. Mr. Hilgert testified that he used a method called the habitat ratio, and he said that using that method he was able to support his generally-held opinion that this stretch of the river is rearing limited. Are you familiar with this habitat ratio method?

A. I'm familiar with it.

Q. Could you explain to us how that works?

A. You need to know the mortality rates between each successive life stages, between each successive life stage, so that you can calculate how many fish of one life stage it's going to take to produce a certain number of

another life stage. You also need to know how much habitat an individual fish requires for each life stage.

On the first case, as far as the mortality rates, there are estimates from various studies that do range fairly widely so that it becomes - in doing a habitat ratio, you have to make an assumption that one particular rate is applicable, and those rates can vary all over the place. And those rates also can be affected by habitat quality, including aspects of habitat quality that are influenced by flow. Therefore, that's a major uncertainty [159] in using habitat ratios.

Another, and I think a much bigger uncertainty in using habitat ratios, is trying to estimate how much habitat does an individual fish use? How much habitat is needed by an adult for spawning, that may be reasonably well known. How much is needed for a rearing juvenile is not well known.

I think we recently calculated or determined from various literature that there are ranges 200-fold, ranges in estimates of how much habitat a juvenile steelhead requires. You have the same sort of thing for each life stage. You have these attempts to quantify. In addition to that complication, then you you have to make the conversion of habitat, as has been measured in habitat area occupied by a fish, as has been measured in relatively few studies to weighted usable area, and the two cannot be converted one-to-one. And so there is a great number of problems with using habitat ratios.

Q. Given these three problems that you have listed with this habitat ratio technique, do you have an opinion as to the reliability of this approach?

A. I don't feel that it's reliable.

Q. To your knowledge does the Department of Wildlife except habitat ratios as a method for determining how fish will do in a given stretch of river?

[160] A. No, I don't.

Q. Do any of the resource agencies that were involved in the Elkhorn project accept habitat ratios to your knowledge?

A. Not to my knowledge.

Q. We heard a description of the life cycle of salmon from Mr. Bruya. Could you briefly tell us how the life cycle of a steelhead is different from the life cycle of a salmon?

A. The life cycle of a steelhead is in many ways -

THE WITNESS: Thank you, Brad.

A. (Continuing) The life cycle of a steelhead is similar in that similar life phases, the timing is different. Steelhead spawn generally in the spring during or just prior to the spring runoff flows. They rear in the stream for usually two full summers, two full years, so they rear for a longer time in the stream than any of the salmon. They migrate back up to the home spawning areas from the sea generally during the winter, and they can migrate almost any month of the year, but the bulk of them, particularly the winter steelhead which is what we have most of in the Puget Sound area, tend to migrate during the winter and into the early spring.

Q. How long do they stay out in the ocean?

A. They stay out in the ocean approximately a year-and-a-half, over two summers. They enter the ocean [161] in the spring. They stay in the ocean through that summer, through the following winter, the following summer and then return.

Q. Okay. Do steelhead juveniles - or let me ask it this way: Do you agree with Mr. Hilgert's testimony that steelhead, juveniles and fry, generally bury into the gravel in the streambed when the water temperature approaches, either reaches eight degrees centigrade or colder?

A. Yes, I would agree with that.

Q. Do you have any personal experience that would verify that phenomena?

A. Yes, I have. I have done some snorkeling in some streams in this area, and streams where I have found in warmer weather large numbers of juvenile fish, both coho salmon and steelhead, and then have snorkeled there in cold weather and been unable to see any fish whatsoever.

Q. Were you here for Mr. Hilgert's testimony?

A. Yes, I was.

Q. And did you hear him several times use the 50 percent exceedence flow as representing existing conditions?

A. Yes, I did. I believe he qualified that and did not state that it was - I think he said it was an index of existing conditions and backed away somewhat from saying that it was existing conditions.

[162] Q. Mr. Beecher, I am looking for a certain exhibit, which has been called Exhibit A-21. Are you familiar with that exhibit?

A. Yes, I am.

Q. And is that the exhibit which is a table and it compares the agencies' stream flow recommendation and Tacoma's stream flow recommendation with the, quote, existing conditions, unquote, represented by the 50 percent exceedence flow?

A. Yes.

Q. Do you have any opinion of using the 50 percent exceedence flow as a representation of existing conditions?

A. I believe it's inappropriate and does not represent existing conditions as experienced by any fish population inhabiting that area.

Q. Could you explain your opinion?

A. Yes. And I think I would have to concur with Mr. Caldwell who stated that the fish are opportunistic. The flows vary widely. The fish experience a wide range of habitat conditions as flows and other physical factors change, biological factors also.

I don't know. Did I answer your question?

Q. I think you did.

In your opinion, what is the optimum flow for fish in the Dosewallips River and in the bypass reach?

[163] A. I don't know what the optimum flow for fish is. It would be very complicated and probably impossible given our current state of knowledge to determine what an optimum flow for fish is.

Q. Let's say you were made the river czar of Washington and you could pick a flow that in your opinion you felt would best protect the fish in the river. What flow would you pick?

A. I would have to consider that I would be more concerned about the risks of losing what we have, and given that the rivers in Washington have historically produced fish which have become adapted to the general seasons and the general types of flow conditions that occur in different seasons, if I were to recommend optimum, I would not recommend any deviation from natural flows because I would be concerned lest I cause some adverse impact to fish populations and other associated wildlife populations.

Q. Now, the term optimum flow has been tossed around a lot in this hearing, and does the term optimum flow have a specific meaning in the IFIM context?

A. I think it is a term that is often used sort of as a shortcut to saying what is often meant, but I think maybe different people mean different things by optimum. I try to avoid the term myself. I don't know that I always succeed, but I try to avoid it and try to look at the peak [164] of the curve of weighted usable area versus flow. And that maximum weighted usable area I think is sometimes referred to erroneously as optimum.

Q. What are the habitat factors that are measured by the IFIM?

A. Depth, velocity and substrate and/or cover.

Q. In the Elkhorn project, what were the factors that were looked at?

A. Depth, velocity and substrate.

Q. Are there factors of habitat which are not measured and factored into the IFIM in the ultimate weighted usable area result?

A. There are other factors which are considered in a qualitative sense in the broader part of IFIM, again in the more qualitative. After you have the PHABSIM, the weighted usable area results, you have to go back and – in fact, the slide show, slide tape show yesterday morning talked about once you've looked at what you think your recommendation might be, then you have to go back and look at those other factors, reassess it in light of everything else you know about the ecology of the stream.

We try to do that and there are – did you ask me to try to enumerate some of those factors?

Q. That was going to be my next question.

A. Oh, okay. I couldn't remember whether you asked that as [165] part of that question.

Things like predation, competition, territoriality, many of these kinds of things go hand in hand. Cover, which is at best only partially incorporated into PHABSIM. Incubation is only partially addressed in PHABSIM and not terribly well. Out-migration flows, migration barriers in passage, those are factors that are not really

addressed in PHABSIM. Water chemistry, physical factors like temperature, those are not addressed in PHABSIM.

Q. So none of those factors that you have just mentioned are actually factored into the weighted usable area?

A. No. And those all have to be at least factored in in a qualitative sense.

Q. And does that factoring in in a qualitative sense occur at the interpretation phase of the IFIM?

A. Yes, it does.

Q. So was it an examination of those types of factors that led to the difference in flow regimes?

MR. BUBENIK: Objection. Leading.

MR. HARRISON: Overruled. You may answer.

Q. (By Mr. Manning): Led to the difference in flow regimes between Tacoma and the agencies?

A. I'm not sure I can answer that because what I can really answer is how I, as one of the participants in the agency [166] group that was developing the flow recommendation, we considered those factors.

While I've listened to what Mr. Hilgert has said in developing the applicant's recommendations, their flow proposals, I can't really compare the two. All I know is that those factors were included in the agency flow proposal.

Q. Given the fact that weighted usable area is only a function of three elements of habitat, do you have an opinion as to the reliability of using weighted usable area as an equivalent of habitat?

A. Yes, I do have an opinion. My opinion is that it is a tool, but it's an incomplete tool that should not be used by itself. And I have had some experience where specific analyses have showed that there really are some differences between weighted usable area and habitat. Apparently - well, even just using those variables, there are a lot ways to interpret and it is a crude index.

Q. Okay. As a final question, given your opinion of the 50 percent exceedence as a representation of existing conditions, and given your opinion of using weighted usable area as the equivalent of habitat, do you feel that Tacoma's consultant can claim with any accuracy that Tacoma's flows will provide as much as or more habitat as is available under, quote, existing conditions?

[167] A. I have real concerns that there will be a real risk. I cannot quantify that risk, but I think there is a real risk that with Tacoma's proposed flows there could be adverse impacts to fish production.

Q. As usual - Mr. Faulk is used to this - I lied by saying this was my last question. This one is, though.

In your opinion, are the agency flows enhancement flows? Will they actually improve fish production in the river?

A. I doubt it. I seriously doubt that they would improve it. I would hope that they would be adequate to protect it.

MR. MANNING: Thank you very much.

* * *

BEFORE THE POLLUTION CONTROL
HEARINGS BOARD
STATE OF WASHINGTON

PUD NO. 1 OF JEFFERSON)
COUNTY AND CITY OF)
TACOMA DEPARTMENT OF)
PUBLIC UTILITIES,)

Appellants,)

vs.)

NO. 86-118

WASHINGTON STATE)
DEPARTMENT OF)
ECOLOGY, DEPARTMENT)
OF WILDLIFE, AND)
DEPARTMENT OF FISHERIES,)

Respondents.)

TRANSCRIPT OF PROCEEDINGS

December 17, 1987

Lacey, Washington

DAY THREE

Cheri L. Davidson
Registered Professional Reporter
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* * *

[39] Q. Ms. Caldwell, could you please state your name and spell it for the record?

[40] A. My name is Jean Caldwell, spelled J-e-a-n, C-a-l-d-w-e-l-l.

Q. And by whom are you employed?

A. I'm currently employed by the Tulalip Indian Fisheries Department.

Q. How long have you been with the Tulalip Fisheries Department?

A. Since June, 1987.

Q. What are your job duties?

A. I'm a fisheries biologist working on instream flow issues, water planning issues, small hydropower project review, and issues relating to the timber fishing wildlife agreement.

Q. In the package of exhibits before you, is your resume one of those exhibits?

A. Yes.

Q. Which exhibit is it?

A. It's R-9.

Q. Okay. Using that as necessary, could you tell us about your educational background?

A. I have a bachelor's of science in Environmental Science from Halsey College at Western Washington University. I worked for - I've worked for the San Francisco Bay Conservation and Development Commission

between 1980 and 1985. I worked for the Lumme Indian Fisheries Department [41] doing environmental review, major project review, small hydro project review, instream flow study, scoping, and water rights negotiation, 1985 to 1987.

I worked for the Washington Department of Fisheries habitat management section both performing instream flow studies for base and planning and reviewing instream flow studies done for hydropower projects. The job was conceived as to provide technical assistance to the other biologist in the habitat management section, which was specifically relating to hydrology and instream flow issues.

Q. Okay. And after the Lummes, who did you work for?

A. Washington State Fisheries.

Q. Can you describe your description with Fisheries and what your job duties were?

A. I just did.

Q. Oh, you did. I thought you were still on the Lummes. I am sorry.

A. No.

Q. Okay. And where did you go after Fisheries?

A. To the Tulalip Fisheries Department Indian Fisheries Department.

Q. And that started in -

A. June, 1987.

Q. Okay. When did you first get involved with the Elkhorn [42] project?

A. I was hired in April, 1985, so it would be starting April 15th, 1985.

Q. At what stage was the Elkhorn IFIM study in at that point?

A. At that time the consultant had run the hydraulic model and had come up with the questions about the best way to run the hydraulic model and the process of discussing that, and discussing it with the instream flow report was either going on or had just started.

Q. Have you ever been to the site?

A. Yes.

Q. How many times?

A. Once.

Q. And did you attend meetings regarding the Elkhorn project?

A. Yes.

Q. Were you involved in the actual setting of the agency flow regime?

A. Yes.

Q. Now. Mr. Ken Bruya has previously testified in this case, and he is also with Department of Fisheries. Was he your boss, or how did that work in the Department of Fisheries?

A. He was not my boss. I was part of a section of the [43] Department of Fisheries that consisted of two

civil engineers and myself, and we were supposed to provide technical assistance to other biologists involved in various projects, and Ken was responsible for the entire review of the Elkhorn project, and I was supposed to provide assistance specifically with relationship to the instream flow study and -

Q. Okay. You may have said this also, and I am sorry that I was not listening, but were you the Department of Fisheries' instream flow expert when you were there?

A. Yes.

Q. Now, there is a packet of exhibits in front of you, and I wonder if maybe we could take the time now since we have not talked about all of these to go through them fairly quickly and just identify what they are. These have all been stipulated to and are in evidence.

A. Do you want me to just start and say this is R-3, this is what this is?

Q. Right, right.

A. This is a - R-3 is a table of the medium monthly flows by month with the agency's flow proposal and both the applicants' flow proposal on it. It's a small version of the chart we have been referring to.

R-4 is a Xeroxed copy of a hydrograph that I drew using information from Hosey and Associates, and I [44] believe the information I got it from is from what is called Exhibit A-21. The blue pen - at least it's blue on mine - is the agency's proposed flows.

Q. Is this a smaller version of R-4?

A. Yes, yes, it is.

Q. Okay. What is R-5?

A. R-5 is a glossary of instream flow terminology that was developed by Hal Beecher, Brad Caldwell, and myself for a class that we taught in 1986 to agency biologists interested in learning more about instream flows used. It was an attempt to simplify some of the jargon that we all throw around too much.

Q. Okay.

A. Do you want me to go through the resumes too?

Q. No, just - Exhibits R-6 through R-11, what are they?

A. Brad Caldwell's resume, Hal Beecher's resume, Ken Bruya's resume, my resume, Elaine Rybak's resume, and Steve Ralph's resume.

Q. Okay. How about Exhibit R-12?

A. R-12 is something we developed in answer to the interrogatories, a table of percentage reduction in predicted weighted usable areas if the flows proposed by Tacoma were adopted for this project.

Q. Instead of Ecology's flows?

A. Instead of Ecology's flows.

[45] Q. Did you prepare R-12?

A. Yes.

Q. Okay. How about R-13 through R-24?

A. Well, all R-13 is - it looks like responses to meeting notes and meeting records. Should I just go one by one, Jay?

Q. No, just generally what that group is.

A. Correspondence relating to the project from the various agencies and Hosey and Associates.

Q. Okay. And R-25?

A. R-25 is a letter to Jefferson County PUD from Ecology about the water quality certification containing the agency's recommended flows among other things.

R-26 is at least some and probably all of the weighted usable area versus flow information that we used to develop the flow regime that we recommended.

Q. Now, is this what we have been referring to as the model output or the weighted usable area tables?

A. That's correct.

Q. This is what the computer actually spits out after it's done doing its thing?

A. That's correct.

Q. How about R-27?

A. R-27 is a retyping of the work sheet that we used to - it's not what we used to develop the flow regime. It's [46] more like a summary that went around for everybody's information so that we would all have record of the final flow regime and what we did.

Q. Okay. R-28?

A. R-28 is a periodicity chart for salmon and steelhead on the Dosewallips River showing what life stages are in the river at what months.

R-29 is a letter from Becky Reinecker of Hosey to Fred Hunn of Department of Ecology containing the 1986, October 21st, 1986, letter from FERC to Jefferson County PUD.

Q. Are you familiar with that letter from FERC?

A. Yes.

Q. This is the so-called deficiency letter?

A. That's correct.

Q. What is that?

A. It's the FERC response to the draft license application.

Q. Okay. Thank you.

When did the agencies formulate their flow regime recommendation?

A. We started at a meeting on June 10th, 1985 where we, Elaine Rybak and Hal Beecher and myself, sat down and did some original number crunching and put some recommendations together. I have notes that there was an agency meeting on August 30th, '85 where we discussed it, [47] and I also have notes that on September 25th, 1985 there was a conference call between agency and tribal biologists where we got to what we now consider the final flow regime, which is the one up there (indicating). So it was during that summer period where we were reviewing it and putting it together.

Q. And that is what we have been referring to as the interpretation phase of the IFIM process?

A. That's correct.

Q. What was the basic approach that was utilized by the agencies?

A. We were trying to optimize for the species that would be the most sensitive to the things that the IFIM study was measuring, which was depth, velocity, and substrate. And our optimization, well, because of that we ended up putting a lot more emphasis on the spawning or the adult life stages than on the juvenile and fine life stages because it's my opinion that they are more sensitive to changes in the things that the IFIM study measures.

Q. When you say optimizing for a given species or life stage, what do you mean?

A. Those terms you use real loosely in - it's what you mean when you're talking about interpreting IFIM values. It usually means picking the weighted usable areas, optimizing meaning the flow that would give you the best [48] predicted usable area.

Q. Now, in your opinion, is that automatically the best fish production flow?

A. There's no way to know that. There's no way to know that.

MR. BUBENIK: Excuse me. I did not hear your answer.

THE WITNESS: There's no way to know what the best fish production is.

MR. BUBENIK: Thank you.

Q. (By Mr. Manning) Was it the intent of the agencies to improve or enhance the bypass reach?

A. That was not my intent, no.

Q. Are you aware of whether it was anybody's intent?

A. It's my opinion that that was not anybody's intent.

Q. What I would like for you to do now - oh, before we do that I would like to ask you if you are familiar with Exhibit A-21, which is the - well, I will just ask you, are you familiar with Exhibit A-21?

A. Yes.

Q. And what is that again?

A. It's a chart that I first saw at a meeting in January, 1986 where Hosey came in with what is now called the applicant's counterproposal.

Q. Okay. What I would like you to do now is - and [49] specifically using R-27 and A-21 as necessary - explain to us how the agency flow regime was actually developed, and let's start with the month of January.

MR. HARRISON: Excuse me, Mr. Manning.

R-27 is just something we have one copy of, or do we all have a copy of it?

MR. MANNING: There is an R-27 in each packet.

MR. HARRISON: All right. So we are going to be looking at that. And then A-21

MR. MANNING: Correct.

MR. HARRISON: (Continuing) does everybody have a copy of that?

MS. BENDOR: I don't.

MR. HARRISON: We have one. Do we have more than one?

MR. FAULK: It's in the packet.

MR. MANNING: It's attached to the brief.

MR. HARRISON: Oh, okay. Fine.

Q. (By Mr. Manning) Ms. Caldwell, I don't mean to limit you in the exhibits that you need to reference. If there are others, please feel free.

A. Should I just start?

Q. Just wait a second.

Okay. Why don't you proceed? Let's start with January, and if you could explain to us how the agency [50] flow regime was developed.

A. Before I start with January I would like to go a little bit more into some of the criteria that we set up before we started going about it.

Q. Please do so.

A. Okay. In the meeting between Hal and Elaine and myself we made a few assumptions because when you have an array of information like you get from an

IFIM output you have to make some assumptions, and you have to make some priorities on what species and life stage you're going to talk about. So some of the assumptions we made were that if we could optimize, well, using the term in the way that I talked about it before, if we could optimize for steelhead, that that would take care of whatever resident fish were in the bypass reach.

For the salmon species we decided we would pay attention to fall and spring chinook and coho, and that given that the different agencies and tribes all have different, slightly different, management priorities and species of concern, that if we were able to meet the different agencies' and tribes' varying priorities consistent with current management and try to not foreclose options for future managers, since this is a hydro project and they have water rights and water rights are forever, that that would take care of our agency [51] responsibilities of our management.

So we were trying to be consistent with what we knew about current management and not foreclose options on future management.

We also decided or made a professional judgment that when possible we would optimize for spawning life stages or adult life stages more than rearing life stages.

Q. Could you explain why?

A. It was our opinion that the spawning life stages are more sensitive to changes in the things that the IFIM study measures than the rearing life stages.

Q. Those being?

A. Depth, velocity, and substrate. We were – at that time we were starting to see more information on the topic that has been discussed already, that in the winter there's a good chance that the juvenile fish are not going to be active and out of the gravel that much.

And even though fry preference information was put through the model, we were coming to the conclusion at the time, which is still my conclusion, that fry's habitat requirements are not well modeled by the IFIM and that in fact fry preference information is erroneous because what it does – the computer model in essence tries to dry up the river to create the kind of edge effect, the shallow, slow water that fry like, and that's [52] just not an accurate representation of the kind of habitat needs that this model fish have.

So we weighted the fry life stages not at all and the juvenile life stages much more lightly than the spawning ones because we were a lot more comfortable with that assumption because of the limitations of the computer model.

Q. Ms. Caldwell, could you explain the term edge effect, what that refers to and what it means?

A. If I said edge effect that's not correct. I think what I meant was edge habitat, that where you find fry in streams is in shallow, slow water, back waters, or near the edge of the stream, and that that's – the computer model really does not take that into account that they are on the edges. It will try to create the whole stream to be that, to be shallow and slow and this steep (indicating), and that's just because it's simple, a simplistic thing, okay?

Q. Okay. Thanks.

A. Okay. So given those weightings and the emphasis on the adults, we kind of - we did - it's a little difficult to explain. It's kind of a two-track calculation because each species has a different optimum, but we tried to see if we picked the optimum for one species, say coho spawning, what it would do to the other species present [53] and if we pick the optimum for say steelhead, what it would do to the other species present.

So we calculated the sensitivity of each life stage to the changes in flow. Some of the output indicates that a change in flow isn't going to affect every prediction the same. Some of the output indicates that for some life stages it would be very sensitive to changes in flow, whereas another life stage may not be.

So we tried to see if we could optimize for as many of the top two I guess spawning life stages as possible and then if we picked that flow what it would do to the other ones, and that is reflected in - and that's what R-27 - that's what generated R-27.

So we didn't try to get all of those to be a hundred percent because you can't do that. What we tried to do was to get the spawning species a hundred percent and not totally take away habitat for the rearing species.

Q. Okay. In doing that, Ms. Caldwell, was at least a part of what you were doing based on Exhibit R-26, which is the weighted usable area output?

A. All the calculations on how habitat would change were based on R-26.

MS. BENDOR: Excuse me. I lost that.

THE WITNESS: All the calculations based on how the habitat would change are calculated from R-26. [54] That's what that - that's the numbers that everybody uses.

Q. (By Mr. Manning) Okay. Should we start with January?

A. Sure.

For January -

Q. And you are now looking at R-27?

A. I'm looking at R-27, and the notes that I am looking at are the original calculations that we made.

Q. Okay.

A. For January we - the species list is there. Looking at coho spawning, the optimum predicted weighted usable area is at 140 CFS. The NC that is across from fall and spring chinook incubation means not calculated, and it's to remind us that there is incubation going on this and that even though it's not calculated in the IFIM we have to pay attention to it, and I'll get back to why we have to pay attention to it in a minute.

So at 140 CFS Chinook spawning we managed to get the coho and chinook juvenile up to 96 percent of optimum and steelhead and chinook at 24 percent of optimum.

Q. And when you use the term optimum, how are you using that?

A. The most habitat predicted by the output by the IFIM model is optimum for each species and life stage.

Q. Now, in January you have coho and chinook juveniles [55] listed twice.

A. Mm-hmm.

Q. In one summer follows the term and then the other winter follows the term -

A. Winter.

Q. (Continuing) and the percentages of maximum weighted usable area vary.

A. Mm-hmm.

Q. Could you explain that?

A. I wasn't on staff at the time that the preference groups were decided on, but it was clear that we were trying to address the fact that we know there's differences in behavior between summer and winter. And because this is sort of an evolving science or study - that was right about the time that at least for the salmon juvenile species I was starting to think that we didn't really have enough information to split out summer and winter, that it's quite possible that in the winter the habitat needs, because rearing fish would either be in gravel or in off-channel habitats or side channels or flood channels, that we weren't describing their habitat needs very well anyway and that we really didn't quite have the information to have these summer and winter groups to be so definite, and in fact I don't believe we ever ran a summer winter salmon curves after this. I'm not totally [56] sure about that.

And we don't - at least when I left Washington State Fisheries we weren't recommending their use. We kind of

collapsed the whole juvenile preference curve into one preference curve for both coho and chinook juveniles, and we don't usually give it a lot of weight in analysis, even though from snorkeling I believe that there's a difference in behavior between coho and chinook. It's just my opinion that there isn't enough data to do this.

So this is sort of the last time we had this ornate summer and winter thing. The reason that I - I think the reason we originally looked at summer juveniles was because we figured if they were out they would be active and less acting like a summer fish. I think that's the reasoning. But in any case that was not terribly highly weighted in our analysis.

Q. In using winter or summer curves, would it have changed the ultimate flow recommendation for January if you had used summer or winter preference curves for coho and chinook juveniles?

A. No, for two reasons. Because of our higher weight on coho spawning, which I already talked about, and because of the fact that we were trying to keep a reasonably steady minimum flow regime across the months that they [57] were in incubation in order to not allow spawning say at one flow and then drop it really far the next month and possibly risk drying up eggs or something like that.

So because of the two needs for flow regime stability and spawning and prioritizing for spawning species, I don't think it would have changed, no.

Q. Okay. Why don't we go on to February?

A. January and February were the two most difficult months to deal with, February in particular because there wasn't spawning species in the way we'd arrayed our timing charts. There wasn't a spawning species to prioritize for; therefore, we took the peak of the steelhead juvenile curve, we used the winter curve on Department of Game's recommendation, and the peak of the coho, chinook juvenile curve is in the summer curves on our recommendation, and since they happen to be the same flow, a hundred CFS, we said we will go with that.

We also made a determination that that drop from 140 to a hundred would probably not be a problem for incubation, so we did look at that as well.

For March - should I go on?

Q. Go on to March.

A. For March the prioritizing was for steelhead spawning, which needs 200 CFS. There's - we figured that there would be steelhead and salmon incubation but that the [58] flows would be stable from 100 to 200, and that also happened to give us pretty high predictions of optimum weighted usable area for the juvenile species, so we decided that the 200 was going to be fine.

For April, again 200 based on steelhead spawning predictions. It gives 92 percent of optimum for the salmon juveniles, and it also happens to give a hundred percent of optimum for steelhead juveniles, which is sort of a bonus.

Q. And was the 200 also adequate for incubation?

A. Yes, in our opinion.

Q. What is the final SPP all anadromous out-migration?

A. That means that during April all of the out-migration occurs, and theoretically if you were going to do a flow regime you would provide outflows. It's not in there because we think we could provide it with a minimum flow. Obviously running the river project is not going to do that, but it's in there to remind us that that has happened.

Q. So specific preference curves were not run for the out-migration life stage?

A. No, no. That's -

Q. Is it your opinion that 200 CFS would be adequate for the out-migration?

A. No.

[59] Q. Then why was 200 recommended by the agencies?

A. Because it maximized predictions for steelhead spawning, and given that the hydro project isn't going to take the peak off the daily peak flows, that's going to be where the out-migration will occur.

Q. I am not sure I follow that. Could you explain that in a little more detail?

A. Okay. This is the minimum flow regime (indicating). The flow events that out-migration is going to occur at are going to be flow events that aren't changed by the hydro project, so they will be the high flow.

Q. Above the maximum machine capacity of 600 CFS?

A. That was the assumption I made, yes.

Q. Okay. Let's move on to May.

A. For May we picked 200 CFS based on maximizing steelhead spawning. It also happens to give you a hundred percent of the predicted optimum for steelhead juveniles, which was nice.

Q. And again, was incubation considered in May?

A. Yes, in the sense that we were trying not to bounce the flow regime around.

Q. Okay. June?

A. We said that the spring chinook would start coming up the river in June. That's what the adult holding means, that there was a curve run or the theoretical preference of [60] the fish that has to be in the river a few months.

And the peak of the predicted weighted usable area for adult holding happened to be 200 CFS, which also happens to be the peak for steelhead spawning, so we were able to maximize for both our adult life stages at the same flow.

Q. And there are three more notations there in June. Would you go over those?

A. Coho and chinook juveniles is at 92 percent of the predicted weighted usable area. Salmon and steelhead incubation is just there, so we remember that it's in the river and we need to not drop the flows too much

below the flows that they were spawning at, and the out-migration notation is there just so we remember that the life stage is happening.

Q. Okay.

A. For July it's the same as June. Our reasoning is the same as June. I think everything is the same with the exception of the out-migration flow.

Q. All right.

A. For August we picked the 200 CFS because of the spring chinook adult holding curve. It also happens to maximize for steelhead juveniles and doesn't hurt coho and chinook juveniles too much, but we picked it basically based on the adult life stage.

[61] Q. Now, the holding, could you explain what is going on at that stage with the fish? I mean, what are they actually doing?

A. Hanging out.

Q. When do the spring chinook come into it?

A. We were assuming in this analysis that the spring chinook would be in the river during June, July, and August and they would start spawning in September, which is basically entering the river and waiting for those three months.

Q. Okay. September?

A. For September we decided that we would have both spring chinook and fall chinook spawning as species of concern. In this case if you pick the optimum for

spring chinook spawning, which was 150 CFS, fall chinook was only 95. If you pick the optimum for fall chinook spawning it had more affect on the spring chinook predicted habitat. In other words, the - it was - oh, boy.

Picking the spring chinook optimum affected fall chinook less than picking the fall chinook optimum affecting spring chinook, and for that reason and because of the importance of the species we picked the spring chinook optimum instead of the fall chinook optimum.

Q. Okay. And how about - how did we do for the other life stages?

[62] A. The percentages are on there, and we decided it wasn't hurting them too much, or at least as far as the predictions went, and the incubation flow is on there so that we don't drop the minimum flow for the months later than that much below 150.

Q. Okay. Shall we move on to October?

A. For October we said that the life stages of priority would be fall chinook spawning and coho spawning. We managed to get optimum and very close to optimum at 140. That does not drop it too much below the spawning flows earlier in the year, so we said that would take care of incubation. It also gives you reasonably high predictions for the steelhead. The split between the summer juveniles and the winter juveniles was done at Game Department's recommendations and is in there for information purposes.

Q. Okay. November?

A. November. Species of concern was coho spawning, which is predicted maximized at 140, and fall chinook spawning, which gets close to maximum at 140. The juvenile information is as you see, and since 140 is very close to the minimum flows recommended for the rest of the fall we decided that would take care of the incubation requirements.

Q. Okay. And finally December.

[63] A. I think December is the same as November with the exception of - we said the fall chinook would be done and it would just be coho spawning as the species of priority.

Q. And again, is incubation a concern at this time?

A. Yes, and we decided that since we weren't dropping the flow too much from what it had been in the fall that that would take care of that.

Q. I notice on Exhibit R-27 after each minimum flow number it says in parentheses or natural flow. Could you explain that?

A. It's a common thing when we put together a minimum flow recommendation, especially for a hydro project that's run on the river and not storage. What we are requesting is the minimum flow, or if they don't want to provide the minimum flow they can provide the natural flow, which obviously in a hydro project is probably going to be less than that. In other words, we are not saying that they have to provide the minimum flow at all costs, which you could say if the project had storage.

Q. Could you make clear one final time for me what the percentage number refers to in the far right-hand column in Exhibit R-27?

A. If the flow we picked for the recommended flow is the same as the flow predicted by the IFIM model output as [64] the best weighted usable area for that life stage, if it's the same it's a hundred percent; if it's less than that it is whatever percentage that flow is of the predicted optimum for that life stage.

Q. The predicted maximum weighted usable area?

A. Weighted usable area.

Q. I would like you to explain in a little more detail what this Exhibit R-4 means and what these lines refer to.

A. Exhibit R-4 is a flow exceedence hydrograph for the Dosewallips River, and it's a blowup of one I drew, and the numbers on the hydrograph we got at the January, 1986 meeting from Hosey and Associates, and it's an attempt to show the range of flows that occur at the project intake.

It was to develop - some of the information to develop this hydrograph was from the real data on the gauge at the Dosewallips River, and some of it was data from the Duckabush and the Snoquamish River. I believe that to be true. I was told that by Hosey's engineer that that was how they arrived at the hydrograph.

Q. Okay. On Exhibit Number 4, the column on the left-hand side, what does that refer to?

A. The column on the left-hand side is cubic feet per second, and it's a semi-log scale so that in order to

get the range of flows necessary to show this hydrograph [65] you -

Q. And could you explain again the 90, 50, and 10 percent numbers that are on the right-hand column?

A. They refer to flow exceedence values, which are generated by taking by month all the daily flows in that month and ranking them by size. The 90 percent exceedence value is that flow that is equal or exceeded 90 percent of the time.

Q. Under natural conditions?

A. Under natural conditions, and can be seen in your mind as a very low flow. The 10 percent exceedence flow is that flow that has met or exceeded 10 percent at the time and it can be seen as a flood flow, just for, well, if you want to simplify it.

This is a kind of typical hydrograph for a glacial stream in the sense that it has two peaks to it, one during the rainy season in the winter and one during the snow melt season later in the spring.

Q. Okay.

MR. HARRISON: Excuse me, Mr. Manning, does that 50 percent exceedence line on Exhibit R-4 correspond to the left-hand column on Exhibit A-21 that we have been calling 50 percent exceedence?

MR. MANNING: Yes, it does.

MR. HARRISON: Thank you.

[66] (Pause in proceedings.)

Q. (By Mr. Manning) Could you generally characterize the agency flow proposal as it relates to this exceedence table?

A. The numbers generated from an IFIM or PHABSIM computer model are generated by the computer model on the flows that you ask it to analyze, and it's done without reference to whether or not that flow occurs in the stream and how often. So that the results from an IFIM computer model have got to be evaluated critically against hydrographic, hydrologic statistics in some way or another.

There's different ways to do it. I like flow exceedence hydrographs for a lot of reasons to do that because they give you a real good idea of the range of conditions as well as the time of flows. There's several reasons to do that. The main reason is if you're in an agency situation and you're asking for a minimum flow it's real helpful if you don't come in there asking for the 10 percent exceedence flow as the minimum flow. There's a way to - it helps you check the computer predictions against some representation of the reality of what's going on in the stream.

In this case, because we had generated our flow recommendations before we had the hydrologic statistics [67] from the consultant, when we compared the two, I personally was a little surprised at how low our flow recommendations were in relation to the flow exceedence. And I would characterize them as in most months being at or below the 90 percent exceedence flow except

for the late summer months when they approach the 50 percent exceedence level.

Q. And the agency flows are represented on Exhibit R-4 by the blue block of color?

A. Right.

MR. MANNING: That is all the questions that I have.

MR. HARRISON: Thank you, Mr. Manning.

Mr. Frymire?

MR. FRYMIRE: I have no questions, Your Honor.

MR. HARRISON: Cross-examine, please.

EXAMINATION

BY MR. BUBENIK:

Q. Do you mind if I call you Jean?

A. No.

Q. Can you, Jean, tell us the goals and policies of the Department of Fisheries in making instream flow recommendations like you did in this for this proposed project?

[68] A. If you want the policy word-for-word I can't quote it. I can tell you what my understanding of it was.

Q. Yes, tell us what your understanding is, please.

A. To recommend a minimum flow that would as far as possible meet the agency's goals on preserving, protecting, and enhancing a fisheries resource.

Q. Are the Department of Fisheries' goals and policies very similar to the Department of Game's with respect to your, well, what you just said are your goals and policies?

A. It's my understanding they are, but I can't quote you the Department of Fisheries' policy word-for-word on that.

Q. It's my recollection your testimony started on this proposed project as far as your involvement in June of 1985?

A. April, 1985. There was a site visit in March of 1985 with a member of the instream flow team that I was aware of because I know they knew I had the job at Fisheries, and they were aware that's how this site visit was handled.

MS. BENDOR: Could you speak up, Ms. Caldwell?

THE WITNESS: (Witness nods affirmatively.)

MS. BENDOR: Thank you.

Q. (By Mr. Bubenik) This one meeting which you talked about where these assumptions were made before you came to your proposed flow recommendations, did you state that you and [69] Hal made those assumptions?

A. I don't - no, I don't think I stated that.

Q. Who was directly involved in making those assumptions?

A. At the meeting where we started generating the flow regime the people that were there were Hal and

Elaine Rybak and myself. Over the three or four months when the agency and tribal resource people were discussing the flow regime it's my recollection that all of us discussed those assumptions and were aware of them.

Q. But you told us about I think six factors or conversations, assumptions.

A. Mm-hmm.

Q. Can you tell me when each one of these assumptions was made and who was present?

A. I don't know if I can do that. The -

Q. Was it one meeting, or was it, as you said, at several different meetings?

A. It's my recollection that the assumptions and our comfort with them was developed over the three or four months that we were developing the agency recommendations then.

Q. So by telling us about these assumptions at this time, what you are doing is going back what, from memory or your notes?

A. (Witness nods affirmatively.)

Q. Do you have any notes with respect to each of these [70] assumptions?

A. I'm going back from notes I took at the time and also notes I made for the class we taught in January of '86 when I was a little bit closer to the issue because in that class the Dosey was the case study that we presented, so I had done somewhat - I had done some of the summary work already because I was trying to - we had developed

the Dosey as a case study for this class that we gave to the agency biologists, so I had that summary that I had done for that as well.

Q. How much involvement did the Department of Ecology have in making these assumptions that you have stated?

A. It's my recollection that there was a set of us involved in discussing these assumptions and developing the flow recommendations and that Brad was one of those people of the group.

MR. MANNING: Brad being who?

THE WITNESS: Brad Caldwell, who was working for Department of Ecology.

Q. (By Mr. Bubenik) But I think you earlier testified that Hal, Elaine, and yourself were involved in -

MR. BENDOR: I am losing you on first names, folks.

MR. BUBENIK: Excuse me, I am sorry.

MR. BENDOR: I mean, I just have to think a [71] little harder. It's difficult.

Q. (By Mr. Bubenik) I believe you testified earlier that Hal Beecher, Elaine Rybak, and yourself were initially involved in making the assumption, is that correct?

A. That's - we were involved in the meeting of June 10th, 1985 where we first developed - we were not the only people involved the rest of that summer and fall.

Q. Can you tell us about the dates on the next meetings or telephone conversations?

A. I have notes from a meeting August 30th, 1985 where my notes say we discussed the flow recommendation.

Q. Who was present at that meeting?

A. My notes say that Elaine Rybak from U.S. Fish and Wildlife Service, Al Gross from the National Marine Fisheries Service, Steve Ralph from Point No Point Treaty Council, Brad Caldwell from Ecology, and myself and Ken Bruya from Department of Fisheries were present.

Q. And do you know how many of these assumptions were discussed and finalized at that meeting?

MR. MANNING: I am going to object to this line of questioning. The Department of Ecology has required the flow regime in question and is obviously satisfied with the assumptions that went into it, and apparently the implication of these questions are that somehow Ecology was unaware of them or did not approve [72] them.

I think that the proof is in the pudding. We have required these flows, and that is the only evidence we need that Ecology has accepted those assumptions.

MR. HARRISON: Do you wish to reply?

MR. BUBENIK: From Ms. Caldwell's testimony it appears that Ecology may have only been minimally involved, and Ecology is trying to I think tell us that they were involved, and I question whether that was actually the case.

MR. MANNING: Well, even if Mr. Bubenik is right, so what?

MR. HARRISON: I will sustain the objection because the flows have been adopted by the department, and they therefore are being reviewed on that basis.

Q. (By Mr. Bubenik) Jean, you talked about Exhibit R-27, and you may recall about the first of December at your deposition I believe you handed us a copy of this, an earlier draft of this document; is that correct?

A. That's correct.

Q. And on this earlier draft on the right-hand column are the letters NA opposite coho slash chinook incubation -

A. Mm-hmm.

Q. (Continuing) as contrasted with the letters NC, which are on the Exhibit R-27?

[73] A. Mm-hmm.

Q. What do the letters NA stand for?

A. They stood for not applicable.

Q. And the letters NC, what do they stand for?

A. Not calculated.

Q. Have the agencies changed their position with respect to coho/chinook as not being applicable as contrasted with not calculated?

A. No.

Q. What is the position?

A. This document that you have was a - this document that he has was a working draft circulated to the

agency biologists working on the Elkhorn project to document and help us remember some of the assumptions and things that we had worked out with regard to this project because there's a lot of instream flow projects and a lot of recommendations.

I put it together and sent it out for comment. I said NA because the IFIM computer model does not calculate incubation flows. It was not - and one of the comments I got back on this draft was that it's not NA. It's not not applicable. That was bad terminology. And so it's not calculated is a little bit more clear, and it really reflects the refinement of this document, which that is.

[74] Q. Are there other changes from this draft that we see on December 1st, 1987?

A. Yes.

Q. Can you tell us about those other changes?

A. We corrected a math error in January and November and December for calculations of the percent of optimum predicted for steelhead winter juveniles. We had calculated 97, and it is in fact 94 percent of optimum predicted weighted usable area. We added calculations for steelhead juveniles to the months of April, May, June, and July because they had been inadvertently left off, and we added calculations for the percent of optimum predicted for using the winter coho and chinook juvenile curves to January, February, March, November, and December for completeness because we knew that that would be discussed in this hearing.

I believe that's all the changes.

Q. Was a copy of this draft or the Exhibit R-27 ever provided to the applicant's consultant?

A. I don't know.

Q. Were the agencies' concerns over some of these life stages ever discussed or written to the applicant's consultant?

A. Could you ask the question again?

Q. Were the agencies' concerns over these various life [75] stages that you have listed on this revised draft communicated to the applicant's consultant?

A. We have had many conversations about the Elkhorn project between 1985 and 1987, and I believe we discussed the issue quite often.

Q. Do you have any data or anything to support your statement that summer curves better describe winter behavior on juvenile coho in the bypass reach?

A. Your question is do I have any data?

Q. Yes, or anything to support your statement and conclusion that summer curves better describe winter behavior of juvenile coho in the bypass reach.

A. No, that's a professional judgment call based on reading the literature and my own feelings about how the computer model works.

MS. BENDOR: Excuse me. Volume, please.

THE WITNESS: Excuse me.

That's a professional judgment call based on reading the literature and my own conclusions about how the computer model works.

Q. (By Mr. Bubenik) Does the potential habitat data for summer coho juveniles peak at a higher low than the data on winter coho juveniles?

MS. BENDOR: Sir, if it's - well, I am having a hard time getting the questions, and if there is a [76] chart you are referring to or a table that is fine, but I am having a hard time tracking the question.

A. (Pause) There's an - I think there's an exhibit in the record that has this stuff graphed out, and it would be nice if I could use it.

Q. (By Mr. Bubenik) What is that? Is that A-11?

A. It's not marked. It's A-11. This may help.

Q. I believe my question related to do the juvenile summer curves reflect a higher flow requirement than the juvenile winter preference curves for coho?

A. It looks like it, yes.

MR. BUBENIK: I have no further questions.

MR. HARRISON: All right. Thank you, Mr. Bubenik.

At this point we will recess for lunch and reconvene at 1:15, please.

(Recess.)

MR. HARRISON: We will be in order, please.

Mr. Bubenik, have you finished your cross-examination?

MR. BUBENIK: Yes, I have.

MR. HARRISON: All right. Are there any questions of the Board of Ms. Caldwell?

MR. FAULK: No questions on my part.

MR. HARRISON: Ms. Bendor?

[77] EXAMINATION

BY MS. BENDOR:

Q. Yes, Ms. Caldwell. I missed one of Mr. Bubenik's questions on cross-examination just towards the end, and your answer was something about it was the result of my professional judgment rather than data. Do you recall what you were answering in response to? If not I can -

A. I think it was why we made the recommendations to move off of the winter coho curves, and I think it was - I think the question was did I have data to back that up.

Q. For which months?

A. He used them in general was the way I understood the question.

Q. Okay. So the question was to use instead of the spring coho -

A. To use the summer curves.

Q. Use summer curves?

A. Right. That's my best recollection.

Q. Okay. I am sure that on recross it will be clarified if that is not the case.

I believe it was your testimony on cross-examination that you had first seen the agency's recommended flow levels and then later on you had seen a hydrographic chart I suppose with the agency flows shown on it or that you superimposed -

[78] A. I superimposed them, yeah.

Q. (Continuing) and that you were surprised by how low the agency flows were?

A. That's correct.

Q. Did you have any resulting thoughts about those low flows? That is, did you have any concerns or anything that flowed from that which -

A. Yes. It indicated to me that perhaps we were not recommending the best flow in there, and because if the - that perhaps the flows recommended were too low.

Q. Too low for what, preservation?

A. Preservation and habitat.

Q. Or enhancement?

A. Preservation.

Q. Did you in any way discuss those thoughts?

A. The agency and tribal biologists discussed that, and I do know that when we were evaluating Tacoma's counter-proposal that that was also a reason that strengthened our desire to stay with the agency for recommending flows, and we didn't want to get any lower. We were already concerned it might be too low.

Q. Did you ever communicate those concerns to the applicant that perhaps the agency flows were too low?

A. I didn't, no.

Q. Do you know if anybody in the agencies communicated that?

[79] A. I don't know. I do remember comments like look, we are giving you so much lower. Why should we go any lower than the minimum flows? I believe there were comments like that.

Q. Do you have any opinion as to where they might be too low, which months? If you don't have any opinion that is also an answer.

A. I don't have an opinion specifically by month. It's more the fact that a lot of the time our minimum flow is below the 90 percent exceedence, below or at the 90 percent exceedence.

Q. Do you have any opinion where it might otherwise be preserved or enhanced? If you don't have an opinion at this point that is also okay.

A. I have no way of knowing that.

Q. I believe it was your testimony in cross-examination - I want to make sure I understand it - that the minimum flows set by the department are not necessarily the flows that will be in the stream. Is that true?

A. That is correct.

Q. And is that because during peak flows the intake pipe capacity for the proposed project can't handle all the volume and therefore there might be amounts going downstream in excess of the pipe capacity plus the minimum flows?

[80] A. That's correct, and also because a lot of - some of these projects use more than one turbine, and they don't necessarily have to have them all on at the same, you know -

Q. Is the maximum amount that the project can take out limited by the pipe capacity, or is there some other factor that we should be aware of?

A. I don't know if it's limited by the pipe capacity or the turbines, but it's my understanding that it's either one or the other.

Q. Whichever is less?

A. Right.

Q. Whichever can accommodate less?

A. Right, right.

Q. Do you know what the pipe capacity is?

A. No.

Q. Do you know what the turbine capacity is?

A. In what is Exhibit A-21, my notes on the copy that I got at the meeting in January, '86 say machine flow 50 to 600 CFS, and so I assumed that that was the turbine capacity.

Q. 50 to 600?

A. Mm-hmm.

Q. Do you know if it was one or two turbines or how many turbines?

A. I don't know.

[81] Q. Is there any document that we have before us now as an exhibit which would indicate what the estimate of the actual flows would be given the realities of the system capacity to withdraw or utilize?

A. I don't understand.

Q. I am trying to understand what the real flows will be in the stream understanding that the agency flows are minimum but are not necessarily actual.

A. Oh, okay. Let's see. Can I try to - can I try to explain?

Q. Sure.

A. If the minimum flow is 200 and their minimum machine flow is 50, the stream is flowing 200 or less, it will be flowing 200. Between 200 and 249 it will be flowing between 200 and 249. At 250 it will go back to 200 as they take the flow between 250, and if the top machine flows 600, then it would be -

Q. I understand that.

I felt the question of if there were more than minimum flow really comes in when you are talking about high flows.

A. That and how they choose to run the power project.

Q. Okay. Is there any way for me to understand from the documents presented what the actual flows are likely to be if the project is operationed?

[82] A. I could draw the hydrograph that I usually draw when I'm usually trying to explain to a manager what the -

Q. And that includes the capacity?

A. Yeah. I could try and draw that for you.

Q. If you believe it would be accurate.

A. I believe it would be a good example.

Q. Well -

A. I am trying to do this - I know you want answers quickly, but what -

Q. I am as concerned about the accuracy as the quickness.

MR. HARRISON: All right. We will have a brief recess at this point. I would like to speak with counsel, please.

Go ahead, Ms. Caldwell.

(Recess.)

MR. HARRISON: All right. We will be in order, please.

Now we are ready to resume your testimony, Ms. Caldwell.

Ms. Bendor?

Q. (By Ms. Bendor) Yes, Ms. Caldwell, what I am trying to find out is what is the actual flow going to be in the stream. I understand that there are minimum flows set, but that does not tell us what actually would be occurring if the project were in place.

[83] A. Mm-hmm. What I've drawn here is a real simplistic one-year daily flow hydrograph - I believe there are a couple of them in evidence already - and that is what the purple line is. So you can see that there would be rain storms and rain events, and this is to indicate that in the summer flow goes very low.

Q. Is the purple line a peak on a particular day, or is it a median for the day, or -

A. It would be the daily flow, the peak on a particular day in this example, just for an example.

Q. So that is CFS?

A. CFS, cubic feet per second. So there's both storm events, high-flow events, and low-flow events on here. The black line is meant to indicate a theoretical minimum flow that's been set for this stream for the theoretical hydro project.

Q. That would be the agency's recommended flow?

A. That would be the agency's recommended flow. Because of the range of flow events in a normal river, if you were to put this on a real hydrograph the minimum flow would be very low. It would be like down here, to scale (indicating). It's not to scale because I wanted to make a couple points with it. It's a little higher than the minimum flow would appear usually.

Q. Are you drawing it straight, or logarithmically in your [84] illustration?

A. Straight in this illustration.

Q. Okay.

A. The kind of salmon color is a theoretical hydro project with some simplifying assumptions that it has got one turbine that's either on or off. It never breaks down. It never goes off line. It's whenever there's water in the river it will be operating. And I just did that to show you, okay?

And because this one turbine has so much capacity it only takes flow between here and here (indicating). So the banner flow is the amount of water that would be removed from the bypass reach during entire project operation.

The couple points to make are that the storm events will still be in the river. On this day - say if you were to take this particular day - the flow in the river would be the sum of the minimum flow and the flow from the storm events put together. If you were to take this particular day, the flow in the river would be lower than the minimum flow, and the power project would not be operating. That's why these break and start again.

So the flow on a particular day is simply this flow with this taken out of it (indicating).

Q. Okay. Now, my follow-up question then is does that [85] additional sum above the salmon-colored drawing -

A. Right.

Q. (Continuing) provide any additional measure of protection or otherwise perhaps negative for the species that you had intended to maximize at particular life stages?

A. Does it -

Q. If you have an opinion on that.

A. It might or it might not. It just depends on the species requirements. I can't know that.

Q. Okay. Thank you.

Now, I have one or two more questions.

Regarding Exhibit R-27 what was the date that that was finalized, if you know?

A. The date it was typed, or the date the information was finalized in an agency sense?

Q. Well, I guess let me ask another question.

I am trying to understand - you had said something that there was a difference between the draft version that was attached to the deposition and the final version, and at one point you said something about you added winter chinook for January through March, November, December, for completeness -

A. Mm-hmm.

Q. (Continuing) because you knew it would be discussed at the hearing.

[86] A. Right.

Q. So am I to assume that R-27 was prepared after the appeal was filed?

A. Right, the additions on R-27 were done after the appeal was filed. This document I believe I generated in typed form. This is the draft that we referred to. I believe the date that this was - the date on it is January, 1987, and I don't know if that was before or after the appeal was

filed. I did this when I was still working for the Department of Fisheries.

Q. So the document that was actually relied upon for the agency decision would have been the draft R-27?

A. It would have been the draft R-27 and whatever notes and work sheets people had developed over the months we discussed this. This was an attempt to get in nice, final typed form for the record what we had been using.

Q. Okay. And one last question.

I missed something during your direct examination. You said there were four assumptions made prior to doing the final result, and you said, number one, if you optimize for steelhead, and I lost that.

A. We decided to make an assumption that if we took care of the predicted habitat requirements for steelhead that we would take care of whatever resident rainbow trout would be present.

[87] Q. Okay.

A. In other words, the other species that Department of Game mentioned.

MS. BENDOR: Thank you. I have no further questions.

MR. HARRISON: Mr. Manning, anything else?

FURTHER EXAMINATION

BY MR. MANNING:

Q. Ms. Caldwell, you expressed some concern in your testimony that the flow regime required by the agencies may not be enough, and I would just like to ask your opinion on sort of the ultimate question in this case, and that is, in your opinion, are the agency flows appropriate to protect the fish resource in the bypass reach?

A. Yes.

Q. Do you know if it's adequate?

A. No.

Q. Okay. And there were also some questions regarding the use of so-called winter preference curves for coho and chinook, juveniles.

A. (Witness nods affirmatively.)

Q. To your knowledge, do any of the agencies that were involved in this case accept winter preference curves for coho and chinook juvenile at this time?

[88] A. To my knowledge the agency recommendation is that those curves not be used.

MR. MANNING: Okay. That is all I have.

MR. HARRISON: Mr. Frymire?

MR. FRYMIRE: I have no questions.

MR. HARRISON: Mr. Bubenik?

FURTHER EXAMINATION

BY MR. BUBENIK:

Q. Ms. Caldwell, when did the agencies chart their flow with relationship to the hydrograph, which I believe is shown on your exhibit there by the door?

MR. BUBENIK: What is the number of that exhibit, Jay?

MR. MANNING: R-4.

A. To the best of my recollection it was after the meeting at the Tacoma Control Center on January 14th, 1986.

Q. (By Mr. Bubenik) Do your notes reflect when that exhibit was made or something similar to that particular exhibit?

A. Could you ask the question again?

Q. Do your notes reflect when that particular Exhibit R-4 was created or something similar to that particular exhibit?

A. No, I don't have a date on it. That's not -

Q. Do you recall when that particular diagram was discussed? What was the exact date of the meeting you mentioned?

[89] A. I'm sorry. Do -

Q. When was the date of the meeting when that similar exhibit or diagram was discussed with the agency?

A. I don't have that. I just - I don't have that information. To the best of my knowledge it was after January, 1986 when we were considering Tacoma's counter-proposal.

Q. But the agency proposal was made in what, November or October of 1985?

A. That's correct.

* * *

* * *

[96] Q. Ms. Rybak, did your agency review the proposed flows by the city of Tacoma?

A. Yes, we did.

Q. Did your agency as an agency reach any result or conclusion on that?

A. Yes, we did. We - the conclusion that we reached was that the flows would not be adequate to maintain the fish [97] and the habitat present in that bypass reach.

MS. BENDOR: Thank you.

* * *

* * *

[109] Q. What was your personal opinion then as to what flow regime should be required with regard to the Elkhorn [110] project?

A. Well, if the cooperation of the Elkhorn hydro project is given, then I felt comfortable with the agency flow recommendations.

Q. What was the treaty council's intent in agreeing to the agency flow regime?

A. To provide - our intent was to reduce the level of risk to treaty council resources to the maximum extent possible, that is, to provide a flow that we would feel would under most conditions provide the kinds of habitats necessary for the perpetuation of spring chinook, steelhead, and coho in the bypass reach.

* * *

BEFORE THE POLLUTION CONTROL
HEARINGS BOARD
STATE OF WASHINGTON

| | | |
|------------------------|---|-----------------|
| PUD NO. 1 OF JEFFERSON |) | |
| COUNTY and CITY OF |) | |
| TACOMA, DEPARTMENT OF |) | |
| PUBLIC UTILITIES, |) | |
| Appellants, |) | |
| vs. |) | PCHB NO. 86-118 |
| DEPARTMENT OF |) | |
| ECOLOGY, DEPARTMENT |) | |
| OF WILDLIFE, and |) | |
| DEPARTMENT OF |) | |
| FISHERIES, |) | |
| Respondents. |) | |

TRANSCRIPT OF PROCEEDINGS

DAY FOUR

December 18, 1987

Lacey, Washington

KIM L. OTIS
Registered Professional Reporter
GENE BARKER & ASSOCIATES
406 Security Building
Olympia, Washington 98501
(206) 943-2693

* * *

[23] Q. Is there explanation also in the license application as to the power generated and the need for the power?

A. Well, there's a section.

MR. MANNING: I am going to object to this testimony based on hearsay. It doesn't matter whether this power is needed or not for the issues in this case.

MR. BUBENIK I think the maximum net benefits test is an issue in the case, Your Honor.

MR. MANNING: The issue in the case is whether or not as a legal issue we would be required to go [24] through the maximum net benefits test. We did not do that. The remedy if in case this board decides we have to do that is remand with instructions telling Ecology to go through the maximum net benefits test. I don't think this board is going to be able to go through the maximum net benefits test for us.

MR. HARRISON: Well, I don't intend to receive evidence on feasibility in this proceeding and, therefore, I will sustain the objection. However, there's a related concern that I think is appropriate for these proceedings and that is - and if you don't care to get into this, that's fine, I think I'll probably raise it when I have a chance. And that is we've had a lot of discussion about whether the agencies have considered Tacoma's flows and ultimately I'd like to know whether the City has considered the agency flows; in so doing, whether they made an ultimate judgment that under the agency flow their proposal is feasible or infeasible. Because if they had made a judgment that it was feasible, I think that would have a lot to do with this

hearing. So at some point I want to get to that ultimate question.

MR. MANNING: Judge Harrison, with all due respect, I don't think that issue is a part of this case. Whether or not this project is feasible under the [25] agency flow regime is clearly beyond the issues set forth that were agreed to by the parties in the prehearing order. The issues are what fish use the bypass reach and whether the agency flows are appropriate to protect fish. Whether or not Tacoma can build this project with the agency flow regime I think is way beyond those issues and it's certainly beyond what I'm prepared to respond to. None of us have dealt with that issue so far and I think that would add a whole new realm to this case that would take us months to prepare for.

MR. HARRISON: I'm not asking for something to be offered for the truth thereof; I'm simply asking for the verbal act as to whether or not Tacoma has made that determination. And if they have made a determination hypothetically that they could go ahead and build the project anyway, then I think that reflects terrifically upon the import of this case. It moots the case. Now if they say otherwise, then it leaves it to another day and another forum, but I would simply like the record to reflect whether as a historical fact they made that determination. Proceed.

Q. (By Mr. Bubenik) Could you address the question that Mr. Harrison has posed?

A. I can't. I try to avoid learning that information because it could bias my presentation or my outlook on [26] what flows I propose. If a project is unfeasible at flows slightly higher than what we've proposed, that

would tend to influence me and I'd have to work hard trying to avoid that bias of trying to strive more strongly for a flow that maybe I wouldn't have agreed to otherwise. On the other hand, I try, I don't want to know if the proponent can get by with flows a lot higher than that, because they would like to get as much energy and I like to avoid conflict, so I would be biased.

Another way of trying to say well, gee, guy, let's not go after this fight for nothing, let's just agree. I try not to get involved with that aspect of it because I don't want to be biased one way or the other no matter what the outcome was.

MR. HARRISON: Very well.

Q. (By Mr. Bubenik) So you do not know whether Tacoma could feasibly construct the project with the agencies' proposed flows?

A. I know that analysis has been done, but I have strictly told people that I work for that I don't want to know, so, sorry, Mark.

MR. BUBENIK: If the Board would like, I could provide that with another witness if that testimony is deemed to be relevant.

MR. HARRISON: Well, you've made that [27] representation in your briefs earlier, if I recall correctly.

MR. BUBENIK: I don't know whether I did or not. I can't recall if I made that representation or not. It might be in the notice of appeal.

* * *

* * *

[60] Q. Now, I want to understand the mechanics of the project just very briefly in terms of the flow that would be remaining in the stream.

Q. Suppose the month required instream flows of 140. Is it true that at 190 cfs the flow in the river would actually be 190 because the machines don't turn on until you say get to 51 cfs?

A. That is correct.

Q. But at 191 the flows in the stream would be 141 because the machines would kick on?

A. The flows in the stream would be 150, 140 because the machines would kick on.

Q. And they would take the 50 plus the one?

A. That is correct.

Q. So there's some sort of funny discontinuity where a certain point it suddenly drops down?

A. Correct.

Q. Now let me ask you, suppose you have that kind of daily fluctuation in low summer flow period? If you want to [61] put up R-3, feel free. What does that do to the possible incubation of eggs that are out there when you have a sudden flow drop during the day or between days where you have that occur? I'm talking now about a daily or variation within a month.

A. Yes. If you had that kicking on and kicking off every day, it would have an impact on fisheries, not only on incubation but perhaps other life stages. The thing is

you can't operate a project turning it on and off that often, the equipment wouldn't stand up. So they look at building the equipment and sizing it to the river so that it achieves what they call a plant factor so that it's on most of the time. That's why we say during September we probably wouldn't even be operating because we can't, you know - let's say a couple days it goes up in September, you don't want to turn it on for a couple of days. It's not worth it. There's too much wear on the equipment.

Q. Let me ask you, is there anything in the documents or exhibits presented to us that clearly specify those kind of operating limitations so that we wouldn't have the kind of kicking on and kicking off when you went right over the 50 plus the cfs flow required in the stream?

A. There's nothing in this document, no.

Q. So we don't know one way or the other as to a certainty when they kick on and when they kick off and for how long [62] and how much of a drop?

A. You don't know that, no, that is correct, and there is no way of you knowing that from this document.

Q. Or from any other exhibits presented to us?

A. So far, no. It hasn't really been an issue and the FERC people generally understand enough about it and we can present that easily enough, it's easy to put it together and we can do it on a daily flow regime.

* * *

[72] MR. HARRISON: I have one final point to raise. Mr. Bubenik, I will address my question to you as counsel for the Appellant. What I am speaking to is not any piece of evidence, but in reference to your notice of appeal, and I ask you whether you have a copy of that notice of appeal?

MR. BUBENIK: Yes.

MR. HARRISON: Now, on page 3 of your notice of appeal you have set forth as one of the grounds for appeal at paragraph 4, subparagraph D, as follows: [Reading] Department's decision is unjust or arbitrary and capricious and will result in substantial economic loss to the PUD and Tacoma because to satisfy the requested minimum flows will result in a total inability to proceed with this project, period, end quote.

Is that the position that the Appellants are taking in this matter?

MR. BUBENIK: Yes, it is, Your Honor.

MR. HARRISON: Now, have the Appellants conducted any actual analysis of the Department's minimum flows before entering this pleading in this matter?

MR. BUBENIK: I do not know for certain. However, it's my recollection that I was clearly advised that, yes, they had analyzed the proposed flows and based upon that found that the project would not be [73] economically feasible.

* * *

BEFORE THE POLLUTION CONTROL HEARING
BOARD
STATE OF WASHINGTON

| | | |
|-----------------------------|---|-----------------|
| PUD NO. 1 OF JEFFERSON |) | PCHB NO. 86-118 |
| COUNTY AND CITY OF |) | |
| TACOMA, DEPARTMENT OF |) | MOTION TO |
| PUBLIC UTILITIES, |) | SUPPLEMENT |
| |) | THE HEARING |
| Appellants, |) | RECORD TO |
| |) | ADD |
| v. |) | ECONOMIC |
| STATE OF WASHINGTON, |) | FEASIBILITY |
| DEPARTMENT OF ECOLOGY, |) | INFORMATION |
| DEPARTMENT OF FISHERIES and |) | |
| DEPARTMENT OF WILDLIFE |) | |
| |) | |
| Respondent |) | |

COMES NOW the Appellant City of Tacoma and respectfully requests that the attached Affidavit Pertaining to Project Feasibility be included in the hearing record for this matter. This information was suggested to be provided, presumably, so that the Board could fully evaluate the maximum net benefits analysis and argument.

DATED this 4th day of February, 1988.

ROBERT J. BACKSTEIN
WILLIAM J. BARKER
MARK L. BUBENIK
G. S. KARAVITIS

By /s/ Mark Bubenik
Mark L. Bubenik
Of Attorneys for Appellant,
City of Tacoma

v.

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
DEPARTMENT OF FISHERIES and)
DEPARTMENT OF WILDLIFE)
Respondent)

STATE OF WASHINGTON)
) ss.
County of Pierce)

Garth Jackson, being first duly sworn on oath,
deposes and says:

1. That I am a professional electrical engineer licensed by the State of Washington and employed by the City of Tacoma, Department of Public Utilities, Light Division.

2. That I have reviewed the economic feasibility information provided by our consulting engineers, Hosey & Associates, pertaining to the proposed Elkhorn project.

| <u>COST (mills/Kwh)</u> | <u>Applicants'</u> <u>Compromise Flows</u> | <u>Agencies</u> <u>Flows</u> |
|-------------------------|---|---------------------------------|
| Average flow | 47 | 56 |
| Firm | 100 | 199 |
| Secondary | 15 | 15 |

4. Normally, when evaluating project economic feasibility the firm power cost is a primary concern. Instream flows required by the Agencies are withdrawn from the reliable or firm power generation leaving only the less reliable secondary power. Therefore, since the Applicants' firm power cost is already at the economic threshold of 100 mills/Kwh, the proposed project would not be economically feasible at the Agencies' proposed flows.

Further sayeth the affiant naught,

/s/ Garth Jackson
Garth Jackson

Subscribed and sworn to before me this 4th day of February, 1988.

/s/ Mark Bubenik
Notary Public in and for the State
of Washington, residing at Gig Har-
bor

BEFORE THE POLLUTION
CONTROL HEARINGS BOARD
STATE OF WASHINGTON

| | | |
|-----------------------------|---|-----------------|
| PUD NO. 1 OF JEFFERSON |) | PCHB NO. 86-118 |
| COUNTY AND CITY OF |) | MEMORANDUM |
| TACOMA, DEPARTMENT OF |) | IN OPPOSITION |
| PUBLIC UTILITIES, |) | TO MOTION TO |
| Appellants, |) | SUPPLEMENT |
| v. |) | THE HEARING |
| STATE OF WASHINGTON, |) | RECORD |
| DEPARTMENT OF ECOLOGY, |) | |
| DEPARTMENT OF FISHERIES and |) | |
| DEPARTMENT OF WILDLIFE |) | |
| Respondent |) | |
| |) | |

The Department of Ecology has received the City of Tacoma's "Motion to Supplement The Hearing Record To Add Economic Feasibility Information." Ecology opposes adding this information to the record in this matter.

Ecology recognizes that the information was provided at the request of the Board. However, the information should not and cannot be made a part of the record.

The information in question consists of an affidavit of Mr. Garth Jackson. Mr. Jackson did not testify at the hearing in this matter and therefore was not subject to cross-examination. Moreover, the prehearing order in this case was explicit as to the issues before the Board. Those issues were, to paraphrase, whether Ecology's flow regime is appropriate for protecting fish, and what fish

utilize the bypass reach. The project's economic feasibility is of no relevance to either one of these issues.

Finally, the information in question is not necessary to resolve Tacoma's contention that the maximum net benefits test must be utilized in this case. That question is a purely legal one, and whether or not the project is feasible with Ecology's flow regime has no bearing whatsoever on the resolution of that issue.

For all of these reasons, Ecology urges that Tacoma's motion to supplement the hearing record be denied.

DATED this 10 day of February, 1988.

KENNETH O. EIKENBERRY
Attorney General

/s/ Jay J. Manning
JAY J. MANNING
Assistant Attorney General
Ecology Division- M/S PV-11
Olympia, WA 98504
(206) 459-6158

CERTIFICATE OF SERVICE

I, BECKY WALDRON, certify that on the 11th day of February, 1988, I mailed a true and correct copy of a Ecology's Memorandum in Opposition to Motion to Supplement the Hearing Record to the following persons at the following addresses:

Mark L. Bubenik
Assistant City Attorney
P.O. Box 11007
Tacoma, WA 98411

William C. Frymire
 Assistnat Attorney General
 M/S PB-73
 Olympia, WA 98504-8071

/s/ Becky Waldron
 Becky Waldron

BEFORE THE POLLUTION CONTROL HEARINGS
 BOARD
 STATE OF WASHINGTON

| | | |
|-------------------------|---|-----------------|
| PUD NO. 1 OF JEFFERSON |) | PCHB No. 86-118 |
| COUNTY, AND CITY OF |) | |
| TACOMA, DEPARTMENT OF |) | ORDER |
| PUBLIC UTILITIES, |) | DENYING |
| |) | MOTION TO |
| Appellants, |) | SUPPLEMENT |
| |) | HEARING |
| v. |) | RECORD |
| STATE OF WASHINGTON |) | |
| DEPARTMENT OF ECOLOGY |) | |
| |) | |
| Respondents, |) | |
| |) | |
| and |) | |
| STATE OF WASHINGTON |) | |
| DEPARTMENT OF WILDLIFE |) | |
| DEPARTMENT OF FISHERIES |) | |
| |) | |
| Intervenors. |) | |
| |) | |
| |) | |

On February 4, 1988, appellant, City of Tacoma, filed its Motion to Supplement the Hearing Record to Add Economic Feasibility Information.

On February 12, 1988, respondent Washington State Department of Ecology filed its Memorandum in Opposition.

Economic feasibility information is not relevant to the subject of base flows which this matter presents. Economic feasibility information may have been germane to settlement discussions among the parties, and reference to the same was suggested solely for that purpose.

Wherefore, the motion is denied.

DONE at Lacey, Washington this 29th day of June,
1988.

POLLUTION CONTROL
HEARINGS BOARD

/s/ William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

| | | |
|------------------------|---|--------------|
| PUD NO. 1 of Jefferson |) | |
| County, and City of |) | |
| Tacoma Department of |) | Cause No. |
| Public Utilities, |) | 89-2-00413-2 |
| Appellants, |) | |
| |) | CERTIFICATE |
| v. |) | |
| STATE OF WASHINGTON, |) | |
| DEPARTMENT OF ECOLOGY, |) | |
| Respondent. |) | |

THIS IS TO CERTIFY that the material transmitted herewith are originals or true and exact copies of original documents and exhibits compiled by the Pollution Control Hearings Board relating to the hearing conducted on the above-referenced matter (PCHB No. 86-118) and that the written material transmitted herewith constitutes the entire record considered by the Board in reaching its decision in this matter.

DATED this 17th day of March, 1989.

/s/ Robyn Bryant
Robyn Bryant, Clerk of the
POLLUTION CONTROL
HEARINGS BOARD

PCHB No. 86-118
PUD NO. 1 of Jefferson County & City of Tacoma v.
Department of Ecology, Department of Fisheries &
Department of Wildlife Thurston County Cause No.
 89-2-00413-2

DOCUMENTS

| | |
|---|-------------------------------|
| Notice of Appeal | Received July 11, 1986 |
| Request for Formal Hearing & Certificate of Mailing | Received July 22, 1986 |
| Motion to Compel Answers to Interrogatories and Affidavit in Support of Motion to Compel Answers to Interrogatories | Received November 20, 1986 |
| Order Compelling Answers to Interrogatories and Certification of Mailing | Dated December 1, 1986 |
| Order Continuing Hearing and Setting Date for Motion Reply | Dated January 8, 1986 |
| City of Tacoma's Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment, including affidavits of Philip Hilgert and Eugene Welch | Received December 12, 1986 |
| Statement of Additional Authorities | Dated January 22, 1987 |

| | |
|--|-------------------------------|
| Cross Motion for Summary Judgment, Memorandum in Opposition to the City of Tacoma's Motion for Summary Judgment and in Support of Ecology's Cross Motion for Summary Judgment, Affidavit of Brad Caldwell, Affidavit of Walter Bergstrom, Affidavit of Kenneth J. Bruya, Affidavit of Hal Beecher, and Certificate of Mailing | Dated January 28, 1987 |
| Memorandum in Reply to DOE's Memorandum in Opposition to City of Tacoma and Affidavit of Phil Hilgert | Dated February 4, 1987 |
| Order Granting Cross Motion for Summary Judgment | Dated April 10, 1987 |
| Motion for Reconsideration | Received April 17, 1987 |
| Order Retaining and Modifying Summary | Dated May 26, 1987 |
| Pre-Hearing Order | Dated June 29, 1987 |
| City of Tacoma's Second Motion for Summary Judgment | Received November 3, 1987 |
| City's Supplemental Memorandum in Support of Motion for Summary Judgment | Received November 10, 1987 |
| City of Tacoma's List of Witnesses and Exhibits | Received November 12, 1987 |

| | |
|--|----------------------------|
| Motion to Compel Answers to Interrogatories and Compliance with Pretrial Order and Affidavit in Support of Motion to Compel | Received November 12, 1987 |
| Department of Ecology's Second Cross Motion for Summary Judgment | Received November 13, 1987 |
| Motion to Compel Answers to Interrogatories or in Lieu Thereof Sanctions and Second Set of Interrogatories Submitted to the Department of Ecology for Response and Request for Production of Documents | Received November 18, 1987 |
| Order Denying and Granting Motion to Compel Answers to Interrogatories | Dated November 30, 1987 |
| Motion to Intervene | Received December 1, 1987 |
| Order Granting Intervention | Dated December 2, 1987 |
| Motion for Reconsideration of Order Granting Intervention | Received December 7, 1987 |
| Second Order Granting Intervention | Dated December 7, 1987 |
| Hearing Memorandum | Received December 8, 1987 |
| Department of Ecology's Trial Brief | Received December 8, 1987 |
| Order Denying Second Motion for Summary Judgment | Dated December 9, 1987 |

| | |
|---|----------------------------|
| Motion to Strike and Motion in Limine | Received December 10, 1987 |
| Hearing Memorandum (Revised) | Received December 14, 1987 |
| Order Denying Motion to Strike and Motion in Limine | Dated December 15, 1987 |
| Final Trial Memorandum | Received February 4, 1988 |
| Motion to Supplement the Hearing Record to Economic Feasibility Information | Received February 4, 1988 |
| Closing Argument | Received February 4, 1988 |
| Memorandum in Opposition to Motion to Supplement the Hearing Record | Received February 21, 1988 |
| Order Denying Motion to Supplement the Hearing Record | Dated June 29, 1988 |
| Final Findings of Fact, Conclusions of Law and Order and statement by member Judith A. Bendor | Dated June 29, 1988 |
| Dissenting Opinion of Judith A. Bendor | Dated July 15, 1988 |
| Petition for Reconsideration, Memorandum in Support of Petition for Reconsideration, and Affidavit of Kenneth O. Slattery | Dated July 7, 1988 |
| Appellant City of Tacoma's Memorandum in Opposition to Petition for Reconsideration | Received July 13, 1988 |

| | |
|---|-------------------------------|
| Revised Final Findings of Fact, Conclusions of Law and Order and Dissenting Opinion | Dated January 25, 1989 |
| Petition for Review of the Decision of the Pollution Control Hearings Board in PCHB No. 86-118 and Affidavit of Service | Received February 24, 1989 |
| Cross Petition for Review of Pollution Control Hearings Board Decision No. 86-118 dated January 25, 1989 and Affidavit of Service | Received March 1, 1989 |
| Original Transcript of Proceedings, Day One | Dated December 15, 1987 |
| Day Two | Dated December 16, 1987 |
| Day Three | Dated December 17, 1987 |
| Day Four | Dated December 18, 1987 |

CORRESPONDENCE

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| Letter to Board from Mr. Bubenik | Dated July 10, 1986 |
| Letter to Parties from Mr. Faulk | Dated July 11, 1986 |
| Letter to Board from Jay J. Manning | Dated July 16, 1986 |
| Letter to Mr. Manning from Mr. Bubenik | Dated October 29, 1986 |
| Letter to Board from Mr. Manning | Dated October 27, 1986 |

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| Letter to Parties from Mr. Faulk | Dated October 31, 1986 |
| Letter to Board from Mr. Bubenik | Received November 20, 1986 |
| Letter to Mr. Manning from Mr. Bubenik | Dated December 3, 1986 |
| Letter to Board from Mr. Bubenik | Dated December 11, 1986 |
| Letter to Board from Mr. Manning | Dated December 30, 1986 |
| Letter to Parties from Mr. Harrison | Dated January 8, 1987 |
| Letter to Board from Mr. Manning | Dated January 16, 1987 |
| Letter to Board from Mr. Bubenik | Dated January 22, 1987 |
| Letter to Parties from Mr. Faulk | Dated January 26, 1987 |
| Letter to Board from Mr. Manning | Dated January 28, 1987 |
| Letter to Board from Mr. Manning | Dated January 29, 1987 |
| Letter to Board from Mr. Bubenik | Dated January 30, 1987 |
| Letter to Board from Mr. Bubenik | Dated February 4, 1987 |
| Letter to Parties from Mr. Harrison | Dated April 10, 1987 |
| Letter to Board from Mr. Bubenik | Dated April 16, 1987 |

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| Letter to Parties from Mr. Harrison | Dated April 17, 1987 |
| Letter to Parties from Mr. Harrison | Dated May 26, 1987 |
| Letter to Parties from Mr. Harrison | Dated June 3, 1987 |
| Letter to Parties from Mr. Harrison | Dated June 29, 1987 |
| Letter to Board from Mr. Bubenik | Dated November 1, 1987 |
| Letter to Parties from Mr. Harrison | Dated November 6, 1987 |
| Letter to Board from Mr. Bubenik | Dated November 9, 1987 |
| Letter to Board from Mr. Bubenik | Dated November 10, 1987 |
| Letter to Board from Mr. Manning | Dated November 13, 1987 |
| Letter to Board from Mr. Bubenik | Dated November 18, 1987 |
| Letter to Board from Mr. Bubenik | Dated November 18, 1987 |
| Letter to Board from Mr. Frymire | Dated November 30, 1987 |
| Letter to Parties from Mr. Harrison | Dated November 30, 1987 |
| Letter to Parties from Mr. Harrison | Dated December 2, 1987 |
| Letter to Board from Mr. Bubenik | Dated December 4, 1987 |

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| Letter to Parties from Mr. Harrison | Dated December 7, 1987 |
| Letter to Board from Mr. Manning | Dated December 8, 1987 |
| Letter to Board from Mr. Bubenik | Dated December 8, 1987 |
| Letter to Parties from Mr. Harrison | Dated December 9, 1987 |
| Letter to Board from Mr. Bubenik | Dated December 9, 1987 |
| Letter to Board from Mr. Bubenik | Dated December 11, 1987 |
| Letter to Board from Mr. Manning together with Draft of Washington State Fisheries Hydroelectric Project Assessment Guidelines | Dated December 23, 1987 |
| Letter to Board from from Mr. Bubenik togetherwith copy of settlement agreement in <i>Northwest Steelehead, et al. v. City of Tacoma and DOE</i> | Dated December 23, 1987 |
| Letter to Board from Mr. Bubenik | Dated January 15, 1988 |
| Letter to Board from Mr. Manning | Dated February 4, 1988 |
| Letter to Board from Mr. Manning | Dated February 10, 1988 |
| Letter to Parties from Mr. Harrison | Dated June 29, 1988 |
| Letter to Board from Mr. Manning | Dated July 7, 1988 |

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| Letter to Parties from Mr. Harrison | Dated July 7, 1988 |
| Letter to Board from Mr. Bubenik | Dated July 12, 1988 |
| Letter to Parties from Mr. Harrison | Dated July 18, 1988 |
| Letter to Parties from Mr. Harrison | Dated July 28, 1988 |
| Letter to Parties from Mr. Harrison | Dated January 25, 1989 |

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Certificate of Dan R. Quaintance,
Court Reporter

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| Deposition of Hal Beecher | Dated December 2, 1987 |
| Deposition of Kenneth Joseph Bruya | Dated December 7, 1987 |
| Deposition of Brad Caldwell, Volume One, Volume Two, and Volume Three | Dated December 7, 1987 |

No. 58272-6

SUPREME COURT
OF THE STATE OF WASHINGTON

P.U.D. #1 OF JEFFERSON COUNTY
and CITY OF TACOMA,

Appellants,

v.

DEPARTMENTS OF ECOLOGY, FISHERIES, and
WILDLIFE Departments of the State of Washington,

Respondents.

ANSWER OF RESPONDENTS
TO STATEMENT OF GROUNDS FOR DIRECT REVIEW
BY THE SUPREME COURT

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State of Washington
Departments of Ecology,
Fisheries and Wildlife

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

| | | |
|--------------------------|---|-------------------|
| P.U.D. #1 OF JEFFERSON |) | No. 58272-6 |
| COUNTY and CITY OF |) | |
| TACOMA, |) | ANSWER OF |
| |) | RESPONDENTS TO |
| Appellants, |) | STATEMENT OF |
| |) | GROUND FOR DIRECT |
| v. |) | REVIEW BY THE |
| |) | SUPREME COURT |
| DEPARTMENTS OF |) | |
| ECOLOGY, FISHERIES, |) | |
| and WILDLIFE, |) | |
| Departments of the State |) | |
| of Washington, |) | |
| |) | |
| Respondents. |) | |
| |) | |

INTRODUCTION

The Respondents herein (referred to as the Agencies) hereby answer the Appellants' previously filed Statement of Grounds for Direct Review by the Supreme Court. While the Agencies disagree with much of what is stated in the Appellants' Statement, it is agreed that direct review by the Supreme Court is appropriate in this case.

Under Rule of Appellate Procedure 4.2(a)(4) one of the types of cases appropriate for direct review is one which involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." The Agencies believe that the issues presented in this case fall directly into this category, and therefore urge the court to grant direct review.

This case involves the Appellants' proposal to construct and operate a hydroelectric project on the Dosewallips River which will remove most of the water from the affected portion of the river for most of the year. The issue here is how much water is to be left in the river. With this background, there are two primary reasons that direct review is appropriate here.

The first is that the outcome of this case will, in all likelihood, determine whether chinook and coho salmon and steelhead trout will be able to continue to use the affected portion of the Dosewallips River. Obviously, this is a fundamental and urgent issue of broad public import. Second, the outcome of this case will determine whether the Department of Ecology will continue to have the ability to ensure that hydroelectric projects do not violate state water quality laws, or whether, on the other hand, Ecology will be relegated to an advisory role only; with the Federal Energy Regulatory Commission making *all* final decisions regarding hydroelectric development in the state.

NATURE OF THE CASE

As stated in Appellants' Statement of Grounds for Direct Review, the Appellants, in response to a requirement by the Federal Energy Regulatory Commission (FERC) applied for a water quality certificate from the Department of Ecology (Ecology). A water quality certification is required under § 401 of the federal Clean Water Act, 33 U.S.C. § 1341, for any applicant for a federal license where the project requiring the federal license will result in a discharge to waters of the state.

A water quality certificate, which is issued by the state, is essentially a written determination that the discharge at issue will not violate state water quality standards. If the discharge will violate water quality standards, the certification should be denied. In addition, a state may impose conditions in a certification to ensure compliance with state water quality standards and with "any other appropriate requirement of state law." 33 U.S.C. § 1341(d).

In this case Ecology determined, after consultation with state, federal and tribal natural resource agencies, that the certification could only be issued with a condition designed to protect a fundamental component of the water quality of the Dosewallips River. That central component is the viability of the river as habitat for salmon and steelhead trout.

The condition imposed by Ecology in the water quality certification consisted of a minimum instream flow. In essence, Ecology determined the minimum amount of water necessary to ensure the stream's continued viability as both spawning and rearing habitat for salmon and steelhead trout. This minimum instream flow was arrived at only after a consortium of experts from the state Departments of Ecology, Fisheries and Wildlife, the U.S. Fish and Wildlife Service, and the Point-No-Point Treaty Council, conducted extensive data analysis and engaged in lengthy discussions amongst themselves and with the Appellants.

The Appellants appealed the water quality certification to the Pollution Control Hearings Board, a quasi-judicial administrative board created under ch. 42.21B

RCW. The Pollution Control Hearings Board (the Board) ruled that Ecology has the requisite legal authority to impose the minimum instream flow condition in the certification. The Board ruled first, that there is no preemption in this case, and second, that the minimum instream flow condition is within the scope of § 401 of the Clean Water Act. This ruling was made on cross-motions for summary judgment.

Later, after a four-day hearing, the Board went on to rule that the specific minimum instream flow required by Ecology in this case was not a true minimum flow, but rather, was an "enhancement flow" which would actually improve the affected portion of the Dosewallips River as habitat for salmon and steelhead trout. The Board went on to conclude that Ecology lacks the legal authority to require an "enhancement" flow under RCW 90.54.020(3)(a), and on this basis invalidated the minimum flow condition in the certification.

The Appellants and the Agencies cross-appealed from the Board's ruling to Thurston County Superior Court. After extensive briefing and oral argument, the Superior Court upheld the Board's legal reasoning on preemption, finding that there is no preemption in this case. More importantly, the court found the Board's decision clearly erroneous, ruling that the Board's factual finding that the Agency minimum flow was actually an enhancement flow to be mistaken after reviewing the entire record. The court also ruled that, even assuming the agency flow regime is an enhancement flow regime, the condition is still appropriate because RCW 90.54.020(3)(a) expressly allows Ecology to utilize minimum flows to enhance rivers and streams as wildlife

habitat. The Appellants now appeal from the Superior Court's ruling.

GROUND FOR DIRECT REVIEW

The most important issue presented by this case is whether chinook and coho salmon and steelhead trout will be able to use the portion of the Dosewallips River that will be affected by the Appellants' proposed hydroelectric project. In setting the minimum instream flow at issue, the Agencies established the stream flow which they truly believe to be the minimum necessary to ensure that salmon and steelhead can continue to use the affected portion of the river. These Agency experts do not believe that salmon and steelhead will be able to continue to use the affected portion of the river if a lower flow is established. The outcome of this appeal will determine whether the Agency minimum flow proposal is upheld or whether a lower flow, or possibly no minimum instream flow at all, will take its place.

The other urgent issue raised by this case goes beyond the Appellants' proposal for a hydroelectric project on the Dosewallips River. The Appellants argue that the Agencies are preempted from imposing a minimum instream flow condition in a water quality certification by the Federal Power Act, 16 U.S.C. § 791 *et seq.* The Appellants make the remarkable argument that the Federal Power Act preempts another federal statute, the Clean Water Act, 33 U.S.C. § 1251 *et seq.* In essence, Appellants argue that Ecology is prohibited by federal law from ensuring that hydroelectric projects comply with state

water quality laws. This position would result in stripping Ecology of its authority and responsibility under a number of state statutes, including ch. 90.48 RCW and ch. 90.54 RCW, and would nullify § 401 of the Clean Water Act.

Were the Appellants to prevail in this appeal, hydroelectric development would be virtually immune from state water quality laws and the Agencies' ability to protect the state's salmon and steelhead resources would be eliminated. Neither the Board nor the Superior Court has ruled for the Appellants on this issue. It is now necessary for the Supreme Court to promptly and ultimately determine this extremely important issue.

CONCLUSION

For the reasons stated above, the Agencies respectfully request that the Supreme Court grant direct review in this case. The case falls squarely within RAP 4.2(a)(4) and therefore is appropriate for direct review. In these days of failing salmon and steelhead runs and Endangered Species Act petitions, the importance of this case can hardly be overstated.

DATED this 11 day of September, 1991.

Respectfully submitted,

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No. 58272-6
 SUPREME COURT
 OF THE STATE OF WASHINGTON

PUD NO. 1 OF JEFFERSON COUNTY AND
 THE CITY OF TACOMA,

Appellants,

v.

DEPARTMENTS OF ECOLOGY, FISHERIES
 AND WILDLIFE,
 Departments of the State of Washington,
 Respondents.

MOTION TO FILE AMICUS CURIAE BRIEF

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MOTION FOR PERMISSION TO FILE
AN AMICUS CURIAE BRIEF

Fourteen state,¹ regional² and national³ conservation groups with an interest in the protection of Northwest salmon and steelhead fisheries (collectively "conservation amici") hereby move the court for (1) leave to file a single amicus curiae brief in this appeal; and (2) leave to exceed the 20 page limit in RAP 10.4(b). The brief, lodged concurrently with this motion, is approximately 35 pages in length.

Conservation amici are groups which together have demonstrated a long-standing interest in the protection and preservation of Northwest salmon and steelhead fisheries. These groups represented herein include the some of the leading conservation groups in the State, (e.g. Washington Environmental Council), as well as in the nation (e.g. Natural Resources Defense Council, the Sierra Club and American Rivers). A description of each group and its purposes is attached to this motion as exhibit A. As is evidenced from Exhibit A, several of amici have intervened in proceedings before the Federal

¹ Washington Environmental Council, Washington Wilderness Coalition, Seattle Audubon Society, Olympic Park Associates, Olympic Rivers Council, The Mountaineers and Washington Trollers Association.

² Northwest Rivers Council and Salmon For All.

³ American Rivers, Natural Resources Defense Council, National Wildlife Federation, Sierra Club and Friends of the Earth.

Energy Regulatory Commission (FERC) relating to the very project at issue in this case.⁴

As a result of their long involvement in water quality and fisheries protection issues, conservation amici are intimately familiar with the issues presented in this appeal. Many of the national groups represented here, such as the Natural Resources Defense Council, were directly involved in lobbying for the passage of the federal Clean Water Act, the construction of which is the central issue in this case. Other state groups such as Washington Environmental Council were involved in lobbying for the passage of the state Water Resource Act, the proper construction of which is also at issue here. Finally, many groups which is also at issue here. Finally many groups seeking to participate here have been involved in efforts to protect the free-flowing rivers of the Olympic Peninsula including the Dosewallips and have intervened in proceedings before FERC relating to licensing of the Elkhorn project. These groups have direct knowledge of the Elkhorn project, the stretch of River which Tacoma proposes to divert, as well as the fisheries which depend on it.

The purpose of the brief that conservation amici seek permission to file is twofold: first, to provide the Court with additional background information concerning the precarious state of anadromous fisheries in the Pacific Northwest and the failure of federal agencies such as the Federal Energy Regulatory Commission to protect these

⁴ These groups include: Friends of the Earth, The Mountaineers, Olympic Park Associates, Seattle Audubon Society, Sierra Club, and Washington Wilderness Coalition.

resources; and second, to supplement arguments made by the respondent State agencies in support of the State's authority under the federal Clean Water Act to deny or condition State certification of federally licensed hydro-power projects for the purpose of protecting the State's threatened anadromous fisheries. Conservation amici do not address the state law issues in this case as these issues have been adequately briefed by the respondent agencies.

Additional argument on the State's authority under the federal Clean Water Act is necessary in order to supplement arguments made by the agencies in their brief. The State agencies argue primarily that the conditions they imposed in this case are authorized under Section 401(d) of the Clean Water Act. While conservation amici agree with the State's position regarding the State's authority under Section 401(d), we strongly believe that the State also has the authority, and indeed the duty, under Section 401(a)(1) of the Clean Water Act and its own water quality standards to impose the conditions it did. Additional briefing is necessary to inform the Court about the State's authority under Section 401(a)(1) to protect the existing beneficial uses of its waterways. Finally, conservation amici believe that it is necessary to supplement the factual record with important, generally available information concerning the precarious state of Northwest salmon and steelhead fisheries and the Federal Energy Regulatory Commission's dismal record of protecting these resources. Much of this information, while relevant, was not included in the State's brief.

The issues raised by Tacoma in their appeal will have great ramifications to conservation amici's continuing efforts to protect this region's and the nation's remaining

anadromous fisheries. The many groups petitioning the Court today all have an interest in these fisheries and deserve to be heard.

Dated: May 15, 1992.

ZIONTZ, CHESTNUT, VARNELL,
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Attorneys for Conservation Amici

Exhibit A

Statements of Interest of Conservation Amici

American Rivers, Inc. is a nonprofit conservation organization incorporated under the laws of the District of Columbia and having a Northwest Regional Office in Seattle, Washington. Its overall mission is to preserve and restore North American rivers and their ecosystems. The goal of its Northwest Regional Office is to reverse the decline of Northwest anadromous fish populations. One of its principal programs is the protection of rivers from unauthorized hydroelectric projects and from hydroelectric developments that fail to take account of the

needs of fish, aquatic organisms, and other natural, recreational and cultural values of North American rivers. American Rivers has approximately 20,000 members nationwide including over 1,500 members in the Pacific Northwest and approximately 600 members in Washington State.

Friends of the Earth is a national conservation organization formed for the purpose of protecting natural resources, including water resources and free-flowing rivers. The Northwest Regional Office of Friends of the Earth, located in Seattle, Washington, serves members in the states of Washington, Oregon and Idaho. Friends of the Earth is a membership organization with over 12,000 members nationwide, approximately 1,200 members in the Northwest, and approximately 900 members in Washington State. Friends of the Earth is an intervenor before the Federal Energy Regulatory Commission (FERC) in the Elkhorn Project (FERC No. 9948-000).

The Mountaineers, founded in 1906, is the oldest recreation and conservation organization in Washington State. Among its purposes are to explore and study the mountains, forests and water courses of the Northwest, and to preserve – by encouragement of protective legislation or otherwise – the natural beauty of Northwest America. The Mountaineers' first expedition was to the Olympic Peninsula in 1907. The Mountaineers has participated in activities relating to protection of Olympic National Park, and was instrumental in encouraging legislation which resulted in additions to the Park in 1976. The Mountaineers is headquartered in Seattle with four branch offices in the Puget Sound region, and more than

13,000 members. It is an intervenor before FERC in the Elkhorn Project (FERC No. 9948-000).

The National Audubon Society ("Audubon") is a nonprofit, national conservation organization with more than 550,000 members, many of whom are affiliated with one of Audubon's 516 local chapters. The mission of Audubon is to effect wise public policy for the environment, especially in major issues that bear on wildlife and wildlife habitat. Audubon plays an active role in a variety of issues that could be significantly affected by the outcome of this case, including the protection and restoration of outstanding river resources and the prudent development of the nation's hydropower resources.

The Natural Resources Defense Council, Inc. (NRDC), is a nonprofit membership organization dedicated to the protection of human health and the environment, and the sound use and preservation of natural resources. NRDC represents approximately 165,000 members and supporters nationwide, including over 4,000 members in Washington State. For over twenty years NRDC's Clean Water Project has worked to ensure proper implementation and legal interpretation of the Clean Water Act, including the rights of states to protect their waters – and members of NRDC to use those waters – against both chemical pollution and other physical impacts that destroy aquatic habitat. NRDC also is working actively in the Pacific Northwest to ensure adequate instream habitat for anadromous fisheries and other uses.

Northwest Rivers Council is a nonprofit conservation organization formed to protect the region's free-flowing rivers for native fish and wildlife habitat, recreation, and

other natural values. The Northwest Rivers Council has more than 800 members throughout the region, and approximately 600 members in Washington State.

Olympic Park Associates is a nonprofit organization incorporated under the laws of Washington State, and headquartered in Seattle, Washington. It was formed in 1948 for the specific purpose of protecting the wilderness and natural resources of the Olympic Peninsula. Olympic Park Associates is an intervenor before FERC in the Elkhorn Project (FERC No. 9948-000).

Olympic Rivers Council is a nonprofit corporation having its principal place of business in Hoodspport, Washington on the Olympic Peninsula. It is a local organization whose mission is building support for the preservation, enhancement and sound management of Olympic Peninsula rivers, including protection of those rivers against unwise hydroelectric projects.

Salmon for All is an Oregon nonprofit corporation registered in Oregon and Washington, and headquartered in Clatsop County, Oregon. Salmon for All is dedicated to maintaining an economically viable commercial salmon fishery on the Columbia River. It represents non-Indian commercial gillnet fishers and fish processors on the Columbia River. Salmon for All has approximately 900 members, including representatives from communities along the lower Columbia River.

Seattle Audubon, founded in 1916, is the oldest natural history organization in Washington State. With over 5,000 members, it ranks 6th in size among the 516 chapters of the National Audubon Society. Seattle Audubon

promotes conservation and wise stewardship of our natural resources, including native fish and wildlife and their habitats. Seattle Audubon is an intervenor before FERC in the Elkhorn Project (FERC No. 9948-000).

The Sierra Club is a nonprofit national conservation organization incorporated in the State of California and having a Northwest Regional Office in Seattle, Washington that was founded in 1963. The Sierra Club was established in 1892 to explore, enjoy, and preserve the nation's forests, waters, wildlife, and wilderness. The first chapter in the Pacific Northwest was formed in 1954. It now has three regional chapters (the Cascade, Oregon and Northern Rockies chapters) as well as 21 local groups in the region, including the Twanoh group on the Olympic Peninsula. The Sierra Club has approximately 600,000 members nationwide, 30,000 members in the region, and 18,000 members, in Washington State. The Sierra Club is an intervenor before FERC in the Elkhorn Project (FERC No. 9948-000).

The Washington Environmental Council (WEC) is a statewide nonprofit citizens group founded in 1967, with its principal place of business in Seattle, Washington. It is the largest and oldest umbrella environmental organization in Washington State, founded to represent the public interest in protection of the environment, including the natural values of Washington's free-flowing rivers. Its members use the resources of Washington rivers, including the Dosewallips River, for fishing, aesthetic enjoyment and other recreational purposes. WEC's membership consists of approximately 2,000 individuals and approximately 100 affiliated organizations representing approximately 100,000 individuals. Since passage of

the Federal Clean Water Act, WEC has been actively involved in ensuring proper implementation of the Act by the Washington State Department of Ecology.

Washington Trollers Association (WTA) is a nonprofit organization of commercial fishermen, specifically salmon trollers, registered in the State of Washington under the Articles of Incorporation since 1977. The WTA represents approximately 950 troll licenses. The WTA functions to further and protect the needs and goals of the commercial salmon troll industry in the State of Washington. This is accomplished through political lobbying on state and federal levels, litigation, and fisheries and habitat protection through enhancement projects and public processes. The WTA actively cooperates with other state groups throughout the State to further the needs of the salmon resource.

Washington Wilderness Coalition (WWC) is a nonprofit corporation organized under Washington law having its principal place of business in Seattle, Washington. WWC has among its purposes the protection and preservation of wilderness resources, including wilderness within Olympic National Park. WWC also has among its purposes the protection and restoration of fisheries resources, and the protection of river ecosystems. WWC is an umbrella organization comprised of approximately 1,000 individual members, as well as 44 Washington environmental groups representing over 20,000 members. WWC is an intervenor before FERC in the Elkhorn Project (FERC No. 9948-000).

No. 92-1911

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

PUD No. 1 of JEFFERSON COUNTY
AND THE CITY OF TACOMA,

v. *Petitioners,*

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE

On Writ of Certiorari to the
Supreme Court of the State of Washington

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QUESTIONS PRESENTED

1. Whether the State of Washington, Department of Ecology, exceeded its authority under § 401 of the Clean Water Act ("CWA"), by conditioning a water quality certificate for a proposed hydroelectric project subject to the Federal Power Act ("FPA") on instream flow quantities for fish habitat that are concededly in excess of requirements necessary for the protection of water quality?

2. Whether Congress intended § 401 of the CWA to repeal the FPA's reservation to the Federal Energy Regulatory Commission of comprehensive responsibility for determining in the FPA licensing process all relevant fish and wildlife, and other environmental conditions, except those contained in State-issued water quality certificates pertaining to the abatement and control of the discharge of pollutants?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1911

PUD No. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE

On Writ of Certiorari to the
Supreme Court of the State of Washington

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington ("Washington Supreme Court"), No. 58272-6 filed April 1, 1993 (Pet. App. 3a), is reported at 121 Wash. 2d 179 and 849 P.2d 646. The "Findings of Fact, Conclusions of Law and Final Judgment" of the Superior Court of the State of Washington in and for the County of Thurston ("Superior Court") were filed August 14, 1991 (Pet. App. 29a). The Superior Court's Memorandum Opinion was filed May 8, 1991 (Pet. App. 37a). The "Revised Final Findings of Fact, Conclusions of Law and Order" of the State of Washington Pollution Control Hearings Board ("PCHB" or "Board") were issued January 25, 1989 (Pet. App. 46a). The PCHB's "Order Granting Cross Motion For Summary Judgment" was issued April 10, 1987 (Pet. App. 74a) and its "Order Denying Second Motion For Summary Judgment" was

issued December 9, 1987 (Pet. App. 70a). The letter order of the State of Washington Department of Ecology granting request for water quality certification was issued June 11, 1986 (Pet. App. 82a). The decisions of the Superior Court, the PCHB and the Department of Ecology are unreported.

JURISDICTION

The opinion of the Supreme Court of Washington filed on April 1, 1993 (Pet. App. 3a) became the decision terminating review in that court, and therefore its judgment, on April 21, 1993 (Pet. App. 1a). The petition for a writ of certiorari was filed on June 1, 1993 and granted on October 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

Sections 301, 302, 303, 306, 307, 401 and 510 of the Clean Water Act ("CWA"), also known as the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§ 1311, 1312, 1313, 1316, 1317, 1341 and 1370; and 4(e), 10(a)(1), 10(j) and 15(a)(2)-(3) of the Federal Power Act ("FPA"), 16 U.S.C. §§ 797(e), 803(a)(1), 803(j) and 808(a)(2)-(3), are reproduced at Pet. App. 86a-146a.

STATEMENT

Petitioners are PUD No. 1 of Jefferson County, Washington, and the City of Tacoma, Washington (herein, jointly, "Tacoma"). They propose to construct the Elkhorn Hydroelectric Project on the Dosewallips River in the State of Washington.¹ On March 18, 1986 Tacoma

¹ PUD No. 1 of Jefferson County is a public utility district organized under Wash. Rev. Code ("RCW") 4.04.020 (1990). The City of Tacoma operates a municipal electric system under RCW 35.92.050 (1990). They are authorized to jointly construct, own and operate electric utility properties by RCW 35.92.280-310 (1990). Respondents are governmental agencies of the State of Washington. There are no parties to this case other than those named in the caption.

applied to the Federal Energy Regulatory Commission ("FERC") for a hydroelectric license under § 4(e) of the FPA, 16 U.S.C. § 797(e). 52 Fed. Reg. 23,342 (1987). Pursuant to FERC regulations (18 C.F.R. § 4.38(a)), Tacoma undertook consultations, starting in 1982, with the Department of Ecology of the State of Washington ("State DOE"), the State Departments of Fisheries and Wildlife, the U.S. Fish and Wildlife Service, the National Marine Fishery Service, and an Indian tribal organization, the Point No Point Treaty Council (R. PCHB Tr., Dec. 15, 1987, 28-30, J.A. 21-23; R. PCHB Ex. A-4, pp. E3-1-E3-45).² As required by the FERC, Tacoma also applied to the State DOE for a certificate under § 401 of the CWA, 33 U.S.C. § 1341.

Section 401(a) requires applicants for federal licenses or permits for the conduct of activity "which may result in any discharge" into navigable waters, to obtain from the State "in which the discharge * * * will originate" a certification that "any such discharge will comply" with applicable provisions of CWA § 303 (water quality standards), §§ 301 and 302 (effluent limitations), § 306 (national standards of performance) and § 307 (toxic and pretreatment effluent standards), 33 U.S.C. §§ 1311, 1312, 1316 and 1317.

On June 11, 1986 the State DOE issued a ~~§ 401~~ certificate for the project under § 401 of the CWA (Pet. App. 82a). The certificate contains a condition purportedly under § 401(d). Section 401(d) requires that certifications set forth any applicable effluent and other limitations and monitoring requirements necessary to comply with enumerated sections of the CWA, "and with any other appropriate requirement of State law * * *." The condition prescribes minimum streamflow quantities that must be maintained for fish habitat purposes (Pet. App. 83a). The certificate states that the flows "are in

² "PCHB Ex." and "PCHB Tr." refer to the record of hearing before the Washington Pollution Hearing Control Board.

excess of those required to maintain water quality * * * (id.).

Tacoma appealed the minimum flow conditions. It contended that water quantities for such a purpose must be determined under the comprehensive balancing process in Part I of the FPA, not by state-imposed conditions under CWA § 401 (Pet. App. 3a-28a). The Washington Supreme Court rejected Tacoma's contentions. (Pet. App. 3a-28a). Processing of Tacoma's application at the FERC has been delayed pending final resolution of the scope of the State's authority under § 401 of the CWA to require minimum streamflow quantities at hydroelectric projects subject to FERC license.

A. The Elkhorn Hydroelectric Project.

The Elkhorn Hydroelectric Project is a new facility which the City of Tacoma and PUD No. 1 propose to construct on the Dosewallips. It would operate in a run-of-river mode, i.e., it would divert, but not store water (Pet. App. 4a; 31a; 61a-62a; 75a-76a). The project would consist of a low (10-foot) diversion weir in the river, a 9-foot diameter tunnel ("penstock") running 1.2 miles downstream and a powerhouse containing two hydro-powered generating units rated at 8.9 MW and 4.4 MW at a head of 295 feet (Pet. App. 61a; 52 Fed. Reg. 23,342 (1987)).

The river segment between the diversion portal and the project's tailrace (where diverted waters return to the river) is known as the by-pass reach. This reach would be located in a canyon. Several fish species populate the reach. The river's flows down the five percent gradient of this reach are fed by snowmelt and glacial run-off that turn it into a torrent of cascading water, except during low flow periods beginning in late August or early September (Pet. App. 61a; R. PCHB Tr., Dec. 15, 1987, 23-24). As proposed in Tacoma's License Application to FERC, the penstock would divert between 50 and 600 cubic feet per second from the river's flow. These proposed diversion volumes would vary with sea-

sonal flows, in order to leave sufficient quantities in the by-pass reach for fish habitat. (R. PCHB Ex. A-4, pp. E3-1 - E3-45.)

B. Statutory and Regulatory Background.

1. The Federal Power Act.

Under the FPA, FERC has exclusive authority to issue licenses for new and existing hydroelectric projects. FPA §§ 4(e), 15, 23(b), 16 U.S.C. §§ 797(e), 808, 817(b). This authority includes original licenses of the kind sought by Tacoma, and license renewals, known as "new licenses," which must be obtained when an original license term expires. FPA § 15, 16 U.S.C. § 808.

The FPA requires FERC, in deciding whether to issue a license, to give equal consideration to power and development purposes, energy conservation, "the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)," recreational opportunities, and other aspects of environmental quality. FPA § 4(e), 16 U.S.C. § 797(e).

FPA § 10(a)(1), 16 U.S.C. § 803(a)(1), requires that a project licensed by FERC be "best adapted to a comprehensive plan" for the waterway, taking into account such factors as power development, "the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat)," irrigation, flood control, water supply, and recreational and other purposes referred to in § 4(e).

Finally, FPA § 10(j), 16 U.S.C. § 803(j), provides that "in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat)" affected by a project, the license "shall include conditions for such protection, mitigation, and enhancement." These conditions are to be based on the recommendations of State and federal fish and wildlife agencies, unless FERC finds that such a recommendation is "inconsistent with the pur-

poses and requirements of [FPA Part I] or with other applicable provisions of law." Thus, under § 10(j), FERC may not license the Elkhorn Project unless it adopts streamflow conditions adequate to protect, mitigate damages to, and enhance fish habitat in the project's bypass reach. Such conditions would have to be formulated after full consideration of the streamflow quantities proposed by the State and federal fish and wildlife agencies.

2. The Clean Water Act.

a. *Regulatory Structure and Definitions.* The regulatory requirements of the CWA are set forth in Titles III and IV. Title III, "Standards and Enforcement", §§ 301-320, 33 U.S.C. §§ 1311-1330, provides for a system of effluent limitations, water quality standards and requirements for the provision of information and guidelines. Title III is administered by the Environmental Protection Agency ("EPA"), and by the States under the supervision of the EPA.

Title IV, "Permits and Licenses", 33 U.S.C. §§ 1341-1345, establishes a system of State and federal permits and licenses for the regulation of discharges. Title IV includes § 401's State certification requirements for federal licenses and permits; § 402's National Pollutant Discharge Elimination System ("NPDES"), under which EPA may grant permits for the discharge of pollutants; § 403's ocean discharge criteria; and § 404's permitting system for discharges of dredged or fill material, administered by the Corps of Engineers ("the Corps").

Section 502, 33 U.S.C. § 1362, defines many of the terms in the CWA regulatory provisions. Under § 502(16), "the term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." The term "discharge of a pollutant" or of "pollutants" means "any addition of any pollutant to navigable waters from any point source * * *." § 502(12). A "point source" is any "discernable, confined and discrete conveyance * * * from which pollutants are or may be discharged." § 502(14). A

"pollutant" means various forms of spoil, wastes and chemicals "discharged into water." § 502(6). The term "pollution" means "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." § 502(19).

Under §§ 101(g) and 510, 33 U.S.C. §§ 1251(g) and 1370, nothing in the CWA is intended to impair or supersede a State's authority, under its proprietary water laws, to allocate quantities of water in its jurisdiction, or otherwise to impair its rights or jurisdiction with respect to such waters.³

b. *Streamflows, Dams and Diversions.* The effect of dams and diversion structures on streamflow is expressly addressed in Title III's provision for federal information and guidelines. Section 304(f), 33 U.S.C. § 1314(f) requires EPA to issue:

- (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and
- (2) processes, procedures, and methods to control pollution resulting from—

* * * *

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

In addition, § 102(b)(6), 33 U.S.C. § 1252(b)(6), provides that FERC licenses for hydroelectric projects may not "include storage for regulation of streamflow for

³ Section 101(g) provides: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."

Section 510 provides: "Except as expressly provided in this Act, nothing in this Act shall, * * * be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters of such States)."

the purpose of water quality control unless the Administrator [of the EPA] shall recommend its inclusion * * *."

c. *The § 401 Certification Requirement.* FERC has made § 401 certification a part of the hydroelectric licensing process under Part I of the FPA. 18 C.F.R. § 4.38(a). Section 401(a)(1) requires an applicant for a federal license or permit for any activity which may result in a discharge into navigable waters of the United States to obtain a certification from the State in which the discharge originates that "such discharge" will comply with applicable sections of the CWA specifically enumerated in § 401(a), i.e., §§ 301, 302, 303, 306 and 307. If the State fails to act on the request for certification within no more than one year, the § 401 requirement is waived. § 401(a)(1).

Section § 401(d) directs that State certifications shall impose limitations and monitoring requirements "necessary to assure" compliance with:

any applicable effluent limitations and other limitations, under section [301] or [302] of this title, standard of performance under section [306] of this title, or prohibition, effluent standard, or pretreatment standard under section [307] of this title, and with any other appropriate requirement of State law set forth in such certification * * *.

Pursuant to § 401(d), any limitations and conditions included by the State in the § 401 certificate, including those based on "other appropriate requirement[s] of State law" become conditions on the federal license or permit. FERC has ruled that it has no authority to reject or revise conditions in a State water quality certification, even when it concludes that such conditions are outside the scope of § 401, because only the State courts may review such certifications.⁴

⁴ *Summersville*, 60 FERC ¶ 61,291 at 61,990 (1992), reh'g denied, 63 FERC ¶ 61,037 (1993); *Carex Hydro*, 52 FERC ¶ 61,216 at 61,770-771 (1990); *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172-173 (1990). See also *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *United States*

d. *Water Quality Standards.* Water quality standards under CWA § 303 are among the provisions on which a State may base compliance conditions under § 401(d). Section 303 is incorporated into § 401(d) because it is expressly enumerated in § 401(a), which defines the scope of State authority to certify federally-licensed discharges, and because § 301, which is listed in § 401(d), requires adoption of effluent limitations necessary to meet water quality standards. § 301(b)(1)(C). Section 303(c)(2) of the Act authorizes the States to adopt water quality standards.

Under § 303(c)(2)(A) the term "water quality standard" is defined by the conjunction of two elements: "the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." Section 303(c)(2)(A).

e. *The EPA's Supervision and Approval of State Water Quality Standards.* Under § 303(c), 33 U.S.C. § 1313(c) State-established water quality standards must be reviewed and approved by the EPA.

EPA's regulations reflect Congress' definition of water quality standards in § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). They provide that "[a] water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. § 131.2. EPA defines "criteria" as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). The criteria must be supported by information sufficient to ensure the "adequacy of the scientific basis of the standards * * *." 40 C.F.R. § 131.6(f). State water quality standards must

Dep't of Interior v. FERC, 952 F.2d 538, 548 (D.C. Cir. 1992); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3rd Cir. 1988); 40 C.F.R. § 124.55(e).

also include an antidegradation policy. 40 C.F.R. § 131.6 and 131.12. Section 303(c)(2)(A) and EPA's regulations result in a two-step format for State water quality standards. The first step requires the State to designate the "uses" desired for a particular body of water. The second step involves establishment of "criteria"—objective, scientifically ascertainable standards—the implementation of which should ensure attainment of water quality sufficient to achieve and protect the designated uses.

3. *Washington's Requirements Concerning Water Quality Standards and Streamflows.*

The State DOE administers the State of Washington's programs under the federal CWA, and decides whether to grant, grant with conditions or deny § 401 certifications. RCW 90.48.260 (Supp. 1992). In accordance with CWA § 303 and RCW 90.48.260, the Department has established "water quality standards for surface waters of the State of Washington." Washington Administrative Code ("WAC") Ch. 173-201, Resp. App. 94a-122a.⁵

EPA approved Washington's standards under § 303 on March 18, 1974. 42 Fed. Reg. 56792 (1977). The standards classify Washington's waters according to uses and the criteria that protect such uses. WAC 173-201-045, Resp. App. 100a. Class AA waters are deemed to be "extraordinary" because they "markedly and uniformly exceed the requirements for all or substantially all uses," including, but not limited to, "fish * * * reproduction, rearing, and harvesting." WAC 173-201-045(1)(a) and (b)(v), Resp. App. 100a. Class AA waters are subject to specific water quality *criteria* which define values for ascertainable factors such as fecal coliform organisms, dissolved oxygen, dissolved gas, temperature, pH, turbid-

⁵ The State of Washington's water quality standards were revised on November 25, 1992. For purposes of this brief, citations are to relevant provisions of the WAC as reprinted in the appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

ity, and toxic, radioactive or deleterious material. *Id.*; WAC 173-201-045(1)(c), Resp. App. 100a-101a.

The Dosewallips River is an unappropriated perennial stream with populations of steelhead, trout, and coho and chinook salmon (Pet. App. 4a; 48a-49a). It and its tributaries are classified as Class AA. WAC § 173-201-080(31), Resp. App. 109a.

A separate provision of Washington's water laws, not subject to approval by EPA under § 303, states that perennial streams "shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, and aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a) (Supp. 1992).

C. *Proceedings Below.*

1. *Administrative Action.*

For purposes of formulating conditions under FPA § 10, Tacoma had accepted the recommendation of the agencies and tribes that it undertake an instream flow study using the Instream Flow Incremental Methodology ("IFIM").⁶ On the basis of the study, Tacoma proposed to FERC and the agencies and tribes that the Project maintain certain base flows in the by-pass reach, ranging between 65 and 155 cubic feet per second ("cfs") depending on the month. The agencies and tribes recommended minimum flows between 100 and 200 cfs (Pet. App. 5a).

The State DOE imposed in the § 401 certificate the flow quantities recommended by the agencies and tribes, although it expressly ruled that such quantities were not required to maintain water quality in the by-pass reach. It explained:

While these flows are in excess of those required to maintain water quality in the by-pass region, they

⁶ IFIM uses a computer modeling study "to determine 'weighted usable area' in a given length of river when flows are varied. The weighted usable area is an indicator of fish habitat * * *." (App. 49a).

are the flows recommend [sic] by the resource agencies and tribes for maintaining sufficient flows for the fishery resource. They are included herein as a matter of cooperation with these other agencies.

Pet. App. 83a-84a. The State DOE's inclusion of the flow conditions in the § 401 certificate became a condition on any license issued, and thus foreclosed FERC from enforcing different flow quantities under FPA § 10(j). In addition, the certification imposed discharge conditions specifically related to construction debris from the project (not challenged here), and a requirement that Tacoma obtain a State water rights permit prior to commencing construction (Pet. App. 83a-84a).

Tacoma appealed the letter order to the PCHB. It moved the Board to grant it summary judgment on the ground that the base flow quantities were not justified by water quality standards or effluent limitations under the CWA. The State DOE did not take issue with this (Pet. App. 77a). The Board concluded that the flow quantities were "not supported by, nor intended to be supported by, water quality standards" (Pet. App. 78a) (emphasis in original). It ruled, however, "that a Section 401 water quality certificate may include limitations to enforce all State water quality-related statutes and rules including, but not limited to, water quality standards." (Pet. App. 79a). The Board subsequently denied Tacoma's second motion for summary judgment, which contended that the State-imposed flow quantities were preempted by the FPA (Pet. App. 70a).

The Board then conducted an evidentiary hearing to resolve two issues: (1) whether the specific base flows imposed by the State DOE are appropriate for preservation of the fishery resource and related values; and (2) what quantity and type of fish inhabit the waters affected by the base flows prescribed (R. Pre-hearing Order dated June 29, 1987, J.A. 15-16).⁷ The Board concluded that

⁷ During the hearing, a member of the PCHB invited Tacoma, over the State DOE's objection, to make a submission as to whether

the State DOE's streamflow quantities were intended to be the optimum flows for the purpose of enhancing the fishery, and that such flows did not satisfy provisions of State water law requiring a balancing of competing beneficial uses (Pet. App. 54a). It vacated the § 401 certificate and remanded with directions that a new certificate be issued containing Tacoma's recommended base flow quantities.

2. Judicial Proceedings.

a. *Superior Court.* The State DOE and Departments of Fisheries and Wildlife petitioned the Superior Court for review of the PCHB ruling. In a May 8, 1991 memorandum opinion, the Superior Court held that because FERC had not yet made any determination as to the appropriate instream flow, *California v. FERC*, 495 U.S. 490 (1990), was inapplicable (Pet. App. 42a). The court then entered formal Findings of Fact, Conclusions of Law and Final Judgment (Pet. App. 29a). It affirmed the PCHB's decision that the minimum flow condition required by the State DOE was not preempted by federal law, reversed the Board's ruling that the State DOE's minimum flow regime was an enhancement under state law, and reversed the Board's conclusion that state law does not permit an enhancement flow condition in the circumstances (Pet. App. 35a).

b. *Washington Supreme Court.* The Supreme Court of Washington granted Tacoma's motion for direct review and affirmed the Superior Court's judgment. (Pet. App. 5a; 28a). First, it ruled that under § 401, the

the Department's prescribed flows rendered the Elkhorn Project economically unfeasible (R. PCHB Tr., Dec. 18, 1987, 23-25; 60-62; 72-73, J.A. 91-96). The PCHB ultimately rejected Tacoma's proffer of an affidavit stating that the project would not be feasible at the proposed flows. It held that the affidavit was "not relevant to the subject of the base flows which this matter presents." (R. PCHB Order of June 29, 1988, J.A. 103; R. Affidavit [of Garth Jackson,] Pertaining to Economic Feasibility attached to Tacoma's Motion to Supplement the Hearing Record To Add Economic Feasibility Information dated February 4, 1988, J.A. 98-99).

streamflow conditions in the § 401 certificate were necessary to assure compliance with the State's water quality standards because those standards prohibit degradation of the State's waters and particularly degradation of fish habitat and spawning in the Class AA Dosewallips (Pet. App. 6a-8a). Citing the definition of pollution in CWA § 502(a), 33 U.S.C. § 1362(a), the court also held that "man-induced alteration of streamflow level is 'pollution'" (Pet. App. 8a).⁸ Finally, the court rejected Tacoma's contention "that water quality standards are limited to pollution and discharges, as opposed to stream flow levels * * *." (Pet. App. 9a). It invoked precedents from other States holding that designated uses, including fish habitat, are an integral part of water quality standards (Pet. App. 8a-10a).

Second, the court held that application of RCW 90.54.020(3)(a) (Supp. 1992), requiring retention of base flows in perennial streams necessary to preserve fish and wildlife, was applicable under the CWA § 401(d)'s provision permitting States to condition water quality certificates on "any other appropriate requirement of State law" (Pet. App. 10a-14a). The court rejected Tacoma's contention that this phrase refers only to water quality standards. The court observed that § 401(d) expressly lists §§ 301, 302, 306 and 307 of the CWA as sources for the limitations in § 401 certificates, but that § 303, relating to water quality standards, is not expressly listed. It then concluded that Congress must have intended the phrase "any other appropriate requirement of State law" to refer broadly to all State water quality-related laws, not just to § 303 State water quality standards (Pet. App. 10a; 13a).

Third, the court rejected Tacoma's contention that the FPA preempted the streamflow conditions in the § 401

⁸ The court cited a letter written to the FERC by an assistant administrator of the EPA to the effect that "[p]rotection of water quality involves far more than just addressing chemistry * * * [r]elevant water quality issues include . . . the diversity and compensation of the aquatic species . . . [and] habitat loss. . . ." (Pet. App. 8a).

certificate (Pet. App. 14a-21a). It held that such conditioning was not independent State action (Pet. App. 14a), but instead was fulfillment of the State's "federally mandated role in the comprehensive federal scheme embodied in the Clean Water Act" (Pet. App. 17a). Therefore, in the court's view the preemption doctrine did not apply. Even if there were independent State action, the court continued, there would be no preemption under the FPA. There could be no "field" preemption because "Congress left room for the States to supplement the FPA through the section 401 certification process." (Pet. App. 19a). There could be no "conflict" preemption for two reasons. First, "the same streamflow condition could have been required directly under the FPA, either by FERC directly or by FERC adopting recommendations regarding streamflow from Ecology during the licensing process." (Pet. App. 19a). Second, the State DOE's mandate required it to act before FERC had determined streamflow conditions (Pet. App. 19a). *California v. FERC*, 495 U.S. 490 (1990), was inapplicable because there is no conflict and "[t]he way in which the Clean Water Act is implicated in the present case completely alters the legal context * * *." (Pet. App. 21a).

SUMMARY OF ARGUMENT

1. In the FPA, Congress vested in FERC exclusive responsibility over streamflow questions, power needs and environmental and ecological concerns arising in hydroelectric licensing proceedings. *First Iowa Hydro Elec. Coop v. FPC*, 328 U.S. 152 (1946); *California v. FERC*, 495 U.S. 490 (1990). The Washington Supreme Court held that the preemptive effect of the FPA under these precedents was inapplicable here because the streamflow limitations imposed under CWA § 401 were necessary to assure compliance with State laws integrated into the CWA. The court errs because the determination of streamflow quantities to protect fish habitat at hydroelectric projects is outside the scope of § 401 and remains the exclusive responsibility of the FERC. FERC must adopt conditions to protect, mitigate damages to, and

enhance fish habitat under FPA §§10(a)(1) and 10(j). Thus, the issue in this case is not whose proposed stream-flow quantities adequately protect fish habitat. It is who Congress intended to prescribe such conditions: the FERC, or State agencies that are limited to certifying compliance with the water quality requirements specified in CWA § 401.

2. The Washington Supreme Court rejected Tacoma's argument "that water quality standards are limited to pollution and discharges, as opposed to streamflow levels" (Pet. App. 9a). The plain language of § 401, however, makes clear that the delegation of certification authority to the States therein is confined to determining whether "such discharge[s]" into the navigable waters as "may result" from federally licensed or permitted activities, will comply with water quality standards authorized under § 303, and with effluent and other limitations specified in § 401(a). Customary usage defines "discharge" as an outletting or a release. A "discharge" cannot be a diversion, impoundment or interruption of a stream's flow. Regulation and control of "discharges" has been the fulcrum of the CWA since 1972. *EPA v. California*, 426 U.S. 200, 202-208 (1976); *Arkansas v. Oklahoma*, — U.S. —, 112 S. Ct. 1046, 1054-1055 (1992). Because diverting or impounding quantities of water are not "discharges", the State DOE lacked authority under § 401 to condition the Elkhorn Project's diversion in order to leave greater quantities in the stream. Moreover, the conditioning authority in § 401(d) becomes applicable only when there is a polluting discharge that cannot otherwise be found in compliance with the water quality standards and limitations enumerated in § 401.

3. Discharges from the Elkhorn Project, once properly identified in the § 401 certificate, must comply with water quality standards under § 303 to qualify for a § 401 certification. The plain language of § 303(c)(2)(A) establishes that a State water quality standard must "consist of the designated *uses* of the navigable waters involved *and* the water quality *criteria* for such waters

based upon such uses" (emphasis added). The Washington Supreme Court reasoned that because one of the "uses" protected by Washington's water quality standards includes the propagation of fish, any "man-induced alteration of streamflow level" that impacts fish habitat is pollution that violates such standards (Pet. App. 7a-8a). "Criteria" are the operative regulatory mechanisms under § 303. Uses designated by a State are the water quality goals that the criteria protect. By focusing solely on uses, the Washington Supreme Court wrongly read Congress' conjunction of uses and criteria out of the statute. Uses cannot be an independent basis for conditions in a § 401 certificate because they represent broad societal goals, not scientifically ascertainable compliance factors. "Criteria" have been the primary regulatory mechanism for water quality standards ever since the 1965 amendments to the ~~FPA~~ authorized the States to "adopt * * * water quality *criteria* applicable to interstate waters * * *." 79 Stat. 908 (emphasis added). Washington has not identified any discharge from the Elkhorn Project that would violate any criteria.

CWA

The antidegradation policy in Washington's water quality standards implement EPA regulations (40 C.F.R. §§ 131.6 and 131.12). The policy is intended to assure that when designated uses and criteria are established or revised they will not allow the degradation of streams. The policy cannot be applied under § 401 independently of the criteria element in § 303(c)(2)(A), for to do so would ignore the specific requirements Congress adopted in that provision.

The challenged streamflow conditions concern the amount of water that may be diverted and the amount that must be left in the by-pass reach. Section 303 standards concern water quality, not water quantities. Water quantity issues are excluded from the CWA by §§ 101(g) and 510(2) in order to prevent interference, by the CWA's federally controlled standards, with proprietary water rights under State law. Congress excluded water quantity issues from direct regulation under the

federally controlled water quality standards authorized in § 303. As Senator Muskie explained early in the legislative development of water quality standards “[w]e are concerned with water quality, not water quantity.” 109 Cong. Rec. 19,678 (1963). Since water quantity issues are generally excluded from the Act, the diversion of water quantities cannot constitute “pollution” as defined in CWA § 502(19). Hydrologic modifications like dams and diversion structures are non-water quality factors that may limit the designation of “uses” for a water body. Congress provided for guidelines, not direct regulation of the impacts on water quality, of disruptions of streamflow by such modifications. CWA § 304(f)(2)(F).

4. A State law requirement under § 401(d) can be “appropriate” only to assure compliance by specific discharges with the standards and limitations under the enumerated provisions in § 401(a). When, as in this case, the only relevant standards to be applied are § 303 water quality standards, other State law requirements are “appropriate” only if they contain scientifically ascertainable *criteria* to guide the conditioning of discharges in the § 401 certification. The Washington Supreme Court believed that any water quality-related State law deemed to control “pollution” was “appropriate”. Under § 401, however, diversion of water quantities is neither a discharge nor “pollution”.

The standard of “appropriateness” in § 401(d) also refers to CWA § 510(1), which allows limitations and standards by the States that are not less stringent than applicable CWA standards. Section 510(1) thus preserves state laws for abatement of pollution from preemption by the CWA. It does not render those laws automatically “appropriate” to the control of discharges for purposes of § 401, unless they can be and are specifically applied to such discharges in order to achieve compliance with § 401’s enumerated requirements. Moreover, § 510(1) does not prevent preemption by the FPA of State laws whose application to hydroelectric projects is outside the scope of § 401.

5. Regulation of the use of water in navigable streams is the heart of the comprehensive federal licensing scheme in Part I of the FPA. Washington’s expansive reading of § 401 subverts that scheme. Under FPA § 10(j) FERC must: (1) include conditions to protect fish and wildlife in any license it grants; and (2) accept conditions recommended by State and federal fish and wildlife agencies, unless it finds such conditions to be inconsistent with the purposes and requirements of the FPA. The Washington Supreme Court’s misconstruction of § 401 preempts FERC’s opportunity to make § 10(j) findings, and defeats the Congressional purpose in adding § 10(j) to the FPA in 1986. There is no basis for concluding that when Congress adopted § 401 in 1972 it unwittingly overruled *First Iowa and California v. FERC* in order to authorize the States to determine the quantities of water that a federally licensed hydroelectric project may use.

ARGUMENT

I. THE ISSUES IN THIS CASE REQUIRE THE CONSTRUCTION AND APPLICATION OF §§ 401 AND 303 OF THE CWA IN LIGHT OF THE FPA’S COMPREHENSIVE REGULATORY SCHEME.

Congress’ intent in enacting the Federal Water Power Act of 1920, the FPA’s predecessor statute, was “to secure a comprehensive development of national resources.” *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 181 (1946). The Court has observed that the key to that comprehensive development is centralization of licensing authority in one federal administrative body which would exercise a consistent and comprehensive planning role. *Id.* at 164, 182. Absent an express and exceptional delegation to the States of authority to impose requirements on this process, FERC’s pervasive jurisdiction over the licensing of hydroelectric projects is exclusive. *FPC v. Oregon*, 349 U.S. 435, 446 (1955). These principles recently were reconfirmed in *California v. FERC*, 495 U.S. 490 (1990), which held that a State’s attempt to impose minimum streamflow conditions in a water permit

was preempted by the FPA because such an exercise of State power conflicted with the FERC's licensing authority.

The Supreme Court of Washington held these precedents to be inapplicable because "[b]y including base flow limitations in the section 401 certificate it issued to Tacoma, Ecology was acting to fulfill its obligation under federal law. The section 401 certificate must assure compliance with State laws integrated into the Clean Water Act." (Pet. App. 16a). The court has erred because the determination of streamflow quantities to protect fish habitat at hydroelectric projects is outside the scope of § 401. Such determinations remain the exclusive responsibility of the FERC under FPA §§ 10(a)(1) and 10(j).

The Washington Supreme Court's reasoning requires that this Court determine, in relation to Part I of the FPA: the scope of the certification authority in § 401(a); for purposes of certifying compliance with § 303 water quality standards, the applicable requirements for such standards;⁹ and the extent of the conditioning authority conferred by § 401(d). The merits of the streamflow quantities proposed by Tacoma, and the State and federal wildlife agencies, to FERC and to the State DOE are not before this Court. The ultimate question in this case is who Congress intended to determine appropriate streamflow quantities for hydroelectric projects: FERC's Commissioners, who under FPA §§ 4(e), 10(a) and 10(j) protect fish habitat while balancing the full range of public interests, or State officials whose mandate under the CWA is limited to reviewing discharges from such projects under § 401 solely for the purpose of determining compliance with specific water quality requirements.

Contrary to the Washington Supreme Court's decision, Congress did not, in § 401, adopt *sub silentio* a State hydropower regulation scheme completely inconsistent

⁹ Washington has never claimed that the streamflow conditions were justified under any of the other sections of the CWA enumerated in § 401.

with the comprehensive responsibilities Congress assigned to FERC in Part I of the FPA. Section 401 "gives States exclusive authority only to issue a certification, prior to licensing, that any *discharge* into navigable waters will comply with [§§ 301, 302, 303, 306 and 307]." *Pennsylvania Dep't of Env'tl. Resources v. FERC*, 868 F.2d 592, 598 (3rd Cir. 1989) (emphasis added).¹⁰ If this Court agrees with Tacoma that Washington has exceeded the limits of the statutory authority delegated to it in § 401, then the streamflow quantities required in the § 401 certificate issued by the State DOE are invalid. If the Elkhorn Project otherwise satisfies the FPA's public interest requirements for a license, any minimum flow quantities "to adequately and equitably protect, mitigate damages to, and enhance" fish habitat must, and will be prescribed by FERC under FPA § 10(j). See also §§ 4(e) and 10(a)(1).

II. STATE CERTIFICATION AUTHORITY UNDER § 401 IS LIMITED TO DETERMINING WHETHER DISCHARGES FROM FEDERALLY LICENSED HYDROELECTRIC FACILITIES COMPLY WITH EPA-APPROVED WATER QUALITY STANDARDS AND OTHER LIMITATIONS ENUMERATED IN § 401.

A. § 401 Is Confined To "Discharges" Which May Result From Licensed Activity.

The Washington Supreme Court rejected Tacoma's argument "that water quality standards are limited to pollution and discharges, as opposed to streamflow levels" (Pet. App. 9a). It reasoned that the policies and goals articulated in water quality standards "all demonstrate a broad concern for water quality, not just with pollution discharges." (Pet. App. 9a-10a). This ruling is incon-

¹⁰ In *Pennsylvania v. FERC*, the Third Circuit rejected a contention by a State environmental agency that FERC unlawfully intruded on the State's certification authority under § 401(d). FERC refused to waive license articles requiring its review and approval of project modifications intended to maintain State water quality standards.

sistent with the plain language of § 401, which is the primary guide to Congress' intent. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989).

Section 401(a)(1) categorically limits State certification authority to determining whether any discharge into the navigable waters which may result from federally licensed or permitted activity will comply with water quality standards authorized under § 303 and the effluent and other limitations specified in § 401(a)(1). This construction is patent from the relevant words in the statute, as emphasized below:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, *which may result in any discharge into the navigable waters*, shall provide the licensing or permitting agency a certification from the State in which the *discharge* originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the *discharge* originates or will originate, that *any such discharge* will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act (emphasis added).

Although the term "discharge" is used throughout the Act, Congress did not provide a general definition. Section 502(16) provides only that:

The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

This language, however, is not actually definitional. It is therefore necessary to resort to other aids to statutory construction.

The first of these is customary usage, for Congress is deemed to use undefined terms in statutes according to their generally understood meaning. *Pioneer Inv. Services Co. v. Brunswick Assocs.*, — U.S. —, 113 S. Ct. 1489, 1494-95 (1993). A standard dictionary definition of "discharge" includes: "to give outlet to: pour forth:

emit (the river [*discharges*] its waters into the bay) * * *." *Webster's Third New International Dictionary* 649 (1971). Thus an indispensable element of "discharge" in relation to receiving waters is an emitting or outletting. In no sense of the term is there an implication that "discharge" means to divert, impound or interrupt the flow of a stream.

A second aid to construction is the statutory context in which the language is used. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (applying *noscitur a sociis*). The triggering event in § 401 is "any discharge *into* the navigable waters" that may result from a federally licensed activity. The term "into" clearly implies the concept of an *addition* of something to the receiving waters. Such an addition occurs when matter is let out or emitted into the receiving waters that would not be there but for the discharge. It thus includes water that has been diverted or impounded from the flow of the stream, that is later returned or released into the stream.

B. Since 1972 The Scheme Of The CWA Has Been Directed To The Control Of Discharges.

Because the term "discharge" is used without qualification in § 401, it must be given a practical construction that achieves the Congressional objective of eliminating discharges that will pollute the navigable waters. Guidance can be drawn from the CWA's regulatory scheme, which has been focused principally on the control of polluting discharges since 1972.

In 1972,¹¹ Congress changed the primary mechanism for the control of water pollution from ambient water

¹¹ The Federal Water Pollution Control Act Amendments of 1972 ("1972 Amendments"), Pub. L. No. 92-500, approved October 18, 1972, 86 Stat. 816. The Clean Water Act grew by legislative accretion beginning in 1948. Pub. L. No. 845, approved June 30, 1948, 62 Stat. 1155. The principal amendments relevant here are the Water Quality Act of 1965 ("1965 Amendments"), Pub. L. No. 89-234, approved October 2, 1965, 79 Stat. 903; the Water Quality Improvement Act of 1970 ("1970 Amendments"), Pub. L. No. 91-224, approved April 3, 1970, 84 Stat. 91; the 1972 Amendments; and the

quality standards to a system for eliminating the discharge of pollutants. *EPA v. California*, 426 U.S. 200, 202-208 (1976); *Arkansas v. Oklahoma*, — U.S. —, 112 S. Ct. 1046, 1054-1055 (1992). The scheme relies principally on EPA-issued "effluent limitations" restricting discharges of pollutants from point sources. These limitations are supplemented by State water quality standards approved by EPA under § 303, "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *Arkansas v. Oklahoma*, — U.S. at —, 112 S. Ct. at 1054 citing *EPA v. California*, 426 U.S. at 205, n.12. Regulation and control of discharges into the navigable waters form the fulcrum of the CWA's regulatory mechanisms.

The apex of that fulcrum is § 301(a) of the Act, which makes unlawful the discharge of any pollutant. This sweeping prohibition, however, is subject to exceptions for discharges in compliance with the effluent limitation provisions contained in § 301, and other requirements in specified sections, including §§ 402 and 404, 33 U.S.C. §§ 1342 and 1344, of the Act. Section 402 establishes the National Pollutant Discharge Elimination System ("NPDES") under which the EPA (or an EPA-authorized State) may issue permits for the discharge of pollutants from "point sources"¹² that meet other requirements of the Act.¹³ Section 404 authorizes the Corps to issue per-

Clean Water Act of 1977 ("1977 Amendments"), Pub. L. No. 95-217, approved December 27, 1977, 91 Stat. 1566.

¹² There is no assertion in this case that the Elkhorn Project is a "point source."

¹³ For purposes of administering the NPDES, under § 402, EPA regulations implementing § 502(12) define "discharge of pollutants" in terms of the additions of pollutants into the waters of the United States from "point sources". 40 C.F.R. § 122.2. Discharges from dams that add nothing to the receiving waters from the outside world are not subject to the NPDES program because § 502(12) requires that there be an "addition" of matter. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982); *National*

mits for the discharge of dredged or fill material into the navigable waters at specified disposal sites, whether or not from a "point source".¹⁴

Because § 402 and § 404 both establish discharge control systems, all applicants for individual § 402 and § 404 permits issued by EPA or the Corps must obtain a § 401 certificate (or a waiver) from the State where the discharge will originate before the responsible federal agency will issue a permit for the discharge. 40 C.F.R. § 122.4(b); 33 C.F.R. § 330.4(c). Where there is no discharge, however, there is no § 401 requirement. Therefore, the Corps' nationwide permit ("NWP") program, which governs permit requirements under CWA § 404 and several other statutes¹⁵ carefully distinguishes between activities that require State § 401 certificates, and those that do not. Section 401 certificates are not required when the permitted activity, in the Corps' opinion, "could not reasonably be expected to result in a discharge". 33 C.F.R. § 330.4(c)(3), n.1. The Corps' administrative construction thus properly recognizes that § 401 applies only when there is a discharge into the navigable waters of the United States.

Although hydroelectric facilities can affect streamflow by diverting or impounding quantities of water, such modifications are not "discharges" within the meaning of § 401. Therefore, States may not attempt to condition such diversions or impoundments in order to leave greater quantities in the stream. As discussed *infra* (pp. 37-42).

Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 583-84 (6th Cir. 1988).

¹⁴ Corps regulations governing § 404 permits define "discharge of dredged and fill material" to mean the addition of such material to the waters of the United States. There is no "point source" limitation. 33 C.F.R. § 323.2.

¹⁵ The NWP program applies to permit requirements under § 10 of the Rivers and Harbors Act of 1899, § 103 of the Marine Protection, Research, and Sanctuaries Act, as well as CWA § 404. 33 C.F.R. § 330.1(g).

the CWA applies only to water quality, not water quantity issues. The conditioning authority in § 401(d) applies only to specific polluting discharges that would otherwise violate § 303 water quality standards or other water quality limitations enumerated in § 401(a). Cf. *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 169-70 (D.C. Cir. 1988) (under § 402, EPA is not authorized to impose non-water quality permit conditions, and is limited to regulating the discharge of pollutants, not the discharging activity).

C. The Legislative History Confirms That § 401 Is Confined To Discharges.

The legislative development of § 401 also confirms that it is confined to the certification of discharges. The requirement for a State certification of discharges from federally licensed activities originated in § 103 of the 1970 Amendments, which added Section 21(b) to the FWPCA. Section 103, P.L. 91-224, 84 Stat. 108 (1970). Section 21(b) was literally broader in scope than the current CWA § 401(a)(1) because it authorized the State to certify "that there is reasonable assurance, as determined by the State or interstate agency that *such activity* will be conducted in a manner which will not violate applicable water quality standards." (emphasis added). When Congress revised § 21(b) in the 1972 Amendments, it expressly eliminated § 21(b)'s reference to "such activity". Under § 401(a) the State certifies "that *any such discharge* will comply with applicable provisions of sections 301, 302, 303, 306 and 307 * * *." 1972 Amendments, 86 Stat. 877 (1972) (emphasis added). The Senate Report on § 401 explained that § 21(b) in the existing law was being "amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any *discharge* of pollutants" (emphasis added).¹⁶

¹⁶ S. Rep. 414, 92d Cong., 2d Sess. 69 (1972), reprinted in Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972* ("1972 Leg. Hist."), Serial No. 93-1, 93d Cong., 1st Sess. 1487 (1973).

The legislative history of § 21(b) also indicates that § 401's delegation to the States was not intended to reach activities that do not result in discharges. The proposal came from § 16(c) of the Senate version as reported. S. Rep. No. 351, 91st Cong., 1st Sess. 113 (1969). The Senate Report, discussing the applications of § 16(c), explained that it was not intended "to apply to the multitude of individual licenses and permits which may be issued by the Federal Government. * * * Almost all such licenses are for activities which are not intended to result in discharges or otherwise affect the waters of the United States * * *." *Id.* at 27.¹⁷ Congress' focus on "discharges" in § 21(b) was continued and refined in 1972 when the words "such discharge" were inserted in § 401.

D. Water Discharged From A Hydroelectric Facility Complies With § 401's Requirements If It Is Not Altered.

Operation of a hydroelectric facility may result in the addition of matter to a stream that adds to, or changes, the water diverted from a stream or impounded behind a dam. The discharge may contain additional matter or water the condition of which has been changed as a result of the Project,¹⁸ or it may return the water without alteration. These potential impacts explain why FERC's licensing process requires applicants to consult with State § 401 certification agencies. 18 C.F.R. § 4.38(a).

Hydroelectric facilities may fall within the scope of § 401 in two ways. First, the construction of such facil-

¹⁷ Congress adopted the House bill, H.R. 4148, 91st Cong., 2d Sess. (1970), but incorporated substantial portions of the Senate bill, S. 7, 91st Cong., 1st Sess. (1969). The House bill did not contain any provisions for state certification.

¹⁸ For example, impounded water when released may contain low dissolved oxygen, dissolved minerals and nutrients, cooled water, sediment, or dissolved gases such as nitrogen. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d at 161-165. The streamflow conditions in this case are not based on any discharge of impounded water having such water quality consequences.

ities may result in the discharge of matter associated with construction (including dredged and fill material for which a § 404 permit would also be required). Section 401 clearly applies to such discharges and Tacoma does not contend otherwise.¹⁹ Second, the operation of a hydroelectric facility necessarily results in the discharge of water. The number and nature of the discharges that result from such facilities depend on the particular facility's configuration and mode of operations.

In general, hydroelectric projects use the gravitational force of water as it moves down a stream from an upper to a lower elevation to drive a mechanical turbine that spins a generator, and thus produces electricity. The force of the falling water is exploited by a dam, or by a diversion structure like the Elkhorn Project's weir, that diverts water *into* a penstock, which then conveys the water down and into the turbine. Water that has passed through the turbine is then returned to the stream somewhere below the powerhouse, through a conveyance known as a tailrace.²⁰ Thus, hydroelectric facilities typically involve at least one discharge. Hydroelectric facilities like the Elkhorn Project are operated in a "run-of-the-river mode", in which total releases are matched as closely as possible to total inflow to the project. Other hydroelectric facilities will operate in a store-and-release mode where a reservoir is used as active storage and the volume of the water stored fluctuates as releases are scheduled.²¹

¹⁹ The State DOE's § 401 certificate sets forth a number of conditions to prevent specified pollutants from entering the water during construction activity, *e.g.*, petroleum products, paint, chemicals such as creosote, dredge spoils, leachates and sanitary waste (Pet. App. 84a).

²⁰ In addition to the tailrace, dams will contain other mechanisms for releasing water into the stream below, including such devices as crest-gates, sluice-gates and release valves that may be used to reduce pressure behind the dam, to spill water over the top during high water or to allow for maintenance on the turbine facility. See C.C. Warnick, *Hydropower Engineering*, 122-148, 209-215 (1984).

²¹ *Energy Law and Transactions* § 53.01 (1993); see also John S. Gulliver & Roger E.A. Arndt, *Introduction to Hydropower Engi-*

In sum, a discharge from a hydroelectric facility occurs when water is released or emitted that has been removed or blocked from the flow of the stream. Neither diversion, impoundment nor intake of water through a penstock can be "a discharge into the navigable waters" under § 401(a) because a discharge requires an outletting or emission of waters that have either been previously diverted from the stream, or previously impounded.

Section 401 requires two determinations: (1) whether there is a discharge; and if so, (2) whether the discharge complies with applicable water quality standards and other limitations enumerated in § 401. If the waters that are thus discharged from a hydroelectric project are unchanged from what went in, then the discharge necessarily complies with the applicable § 401 standard. On the other hand, if the discharge results in an addition to or change in the condition of the water that would prevent compliance with the § 303 water quality standards and other limitations enumerated in § 401, the conditioning authority in § 401(d) becomes applicable with respect to that specific discharge. If there is no "addition" or change, the discharge complies with § 401 and it must be certified. Cf. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) (discharger not required to treat and reduce pollutants in intake water).

National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988), illustrates the need for an addition or change. That case involved a pumped storage

neering, in *Hydropower Engineering Handbook*, Section 1.3 (John S. Gulliver & Roger E.A. Arndt eds., 1991). Projects may use diversion structures or dams. The configuration of such projects, *i.e.*, the design and placement of the dam or diversion, penstock, power house, etc. depends on the physical characteristics of the site, including such matters as the change in elevation that produces the water's power head, the hydrologic characteristics of the stream, and cost and environmental considerations bearing on the various construction and operating choices practically available in the circumstances. *Id.* See also C.C. Warnick, *Hydropower Engineering*, 6-8 (1984).

project that drove its turbines electrically to pump water from Lake Michigan through conduits to a reservoir above the powerhouse. At peak hours, the flow was reversed, and the water was released down the conduits to drive the turbines mechanically and produce electricity. The water then passed through a short conveyance back into the lake. Some fish were entrained through the turbines as water flowed from the lake to the reservoir and back again. The Sixth Circuit found that nothing had been added to Lake Michigan by the release that had not already been there. In consequence, because there had been no discharge of pollutants, the facility did not require an NPDES permit under § 402. The Sixth Circuit followed the reasoning of *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), which similarly held that NPDES permits are not required for hydroelectric facilities because such facilities add no pollutants to the receiving waters from the outside world.²²

²² Cases under § 313 of the CWA, 33 U.S.C. § 1323, are consistent with *Consumers Power* and *National Wildlife Fed'n v. Gorsuch*. Section 313 subjects federal facilities engaged in activity that results in the discharge or run-off of pollutants to compliance with all federal, State, interstate and local requirements concerning control and abatement of water pollution. In *Missouri v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982), the Court of Appeals affirmed a district court's holding that release of water from a Corps dam did not cause the discharge of a pollutant because there was no addition of a pollutant from a point source. In a subsequent case under § 313, *United States v. Tennessee Water Quality Control Bd.*, 717 F.2d 992, 999 (6th Cir. 1983), cert. denied, 466 U.S. 937 (1984), the court held that seepage through a dam to the riverbed below similarly did not constitute a discharge that added pollutants to the stream.

III. UNDER § 303, OBJECTIVE "CRITERIA", NOT "USES", ARE THE FUNDAMENTAL REGULATORY MECHANISM.

A. The Plain Language of § 303(c) Makes "Criteria", Not "Uses", The Regulatory Basis For Determining Compliance.

To obtain a § 401 certification, identified discharges from the Elkhorn Project must comply with § 303 water quality standards ("WQS"). State authority is limited by the requirements for such standards in § 303. The Washington Supreme Court disregarded the relevant language in § 303(c). It ruled that because one of the "uses" in Washington's WQS as approved by EPA includes the propagation of fish, any "man-induced alteration of streamflow level" that impacts fish habitat is "pollution" that may violate such standards. (Pet. App. 7a-8a). This ruling reflects a fundamental misconstruction of § 303's provisions.

The applicable definition of water quality standards is plainly set forth in § 303(c)(2)(A). To obtain EPA approval under § 303(c), State standards must "consist of the designated *uses* of the navigable waters involved *and* the water quality *criteria* for such waters based upon such uses * * *." (emphasis added).²³ Section 303(c)(2)(A) also requires that such standards be "established taking into consideration their use and value for * * *" an open-ended list of water uses, including specifically, the propagation of fish and wildlife. *Id.* Thus, under the language of § 303(c)(2)(A), the "criteria"

²³ Prior to the adoption of § 303 in the 1972 Amendments, 86 Stat. 846, some States had adopted water quality standards pursuant to their own laws. Other States had adopted such standards pursuant to § 10(c) of the FWPCA as amended by the 1965 Amendments, § 5(a), 79 Stat. 907. In § 303(a) Congress provided for the continuation of previously issued State standards unless the Administrator of EPA determined that they were inconsistent with the requirements of the FWPCA prior to the enactment of § 303. In § 303(c)(2)(A), Congress also established requirements for new and revised standards. Whenever a State revises or adopts new standards, it must submit them to the Administrator of the EPA.

provide the operative regulatory requirements and the designated "uses" provide water quality goals that the criteria are to protect and advance.

The Supreme Court of Washington erroneously disregards Congress' careful distinction in § 303(c)(2)(A) between "designated uses" and "criteria" by focusing solely on the fish habitat "use" of the State's water quality standards, in WAC Ch. 173-201, Resp. App. 94a-122a. It also erroneously reads out of the statute the conjunction of the two terms in § 303(c)(2)(A) (*i.e.*, "such * * * water quality standard shall consist of the designated uses * * * and the water quality criteria * * * based upon such uses." (emphasis added)). It improperly treats "and" as if it meant "or". *Bruce v. First Fed. Sav. & Loan Ass'n of Conroe*, 837 F.2d 712 (5th Cir. 1988).

The misapplication of § 303(c)(2)(A) is patent on the face of the State DOE's § 401 certificate. The certificate expressly concedes that the streamflow requirements imposed are in excess of levels needed to preserve water quality, and that they are intended to satisfy the fish protection goals of the various resource agencies and tribes (Statement, *supra* p. 2; Pet. App. 83a-84a).²⁴ Moreover, neither the PCHB nor the Washington Supreme Court identified any discharge into the Dosewallips River

²⁴ The PCHB had before it a *post hoc* affidavit that attempted to rewrite the certificate. It is entitled to no weight. The affiant, Mr. Walter Bergstrom, stated that he drafted the paragraph which states that the prescribed flows were "in excess of those required to maintain water quality in the by-pass region. . .". He asserted, however, that he meant only to refer to criteria for water temperature (Pet. App. 77a). Mr. Bergstrom may have helped prepare the certification (*id.*), but the responsible signature was the Department of Ecology's regional manager, Mr. Clark Haberman, not Mr. Bergstrom (Pet. App. 82a-85a). Moreover, although the PCHB noted Mr. Bergstrom's assertion, it concluded "that the base flow limitation in question is not supported by nor intended to be supported by, water quality standards." (Pet. App. 78a) (emphasis in original). The Washington Supreme Court reached its decision by relying on the broad purpose of the State's WQS to protect fish and wildlife, not Mr. Bergstrom's affidavit.

from the Elkhorn Project, or found that any "such discharge" was inconsistent with criteria in WAC 173-201-045, Resp. App. 100a-101a.

B. EPA's Regulations Make "Criteria" The Principal Regulatory Mechanism For Application Of Water Quality Standards.

Under § 303(c)(3), if the Administrator of EPA is unable to approve a State's WQS, she must promulgate them herself. If she determines that a State's standard meets the requirements of the Act, "such standard shall hereafter be the water quality standard for the applicable waters of that State." Section 303(c)(3). EPA's regulations governing approval of State WQS under CWA § 303 impose a three-part framework on State standards: designation of uses (40 C.F.R. §§ 131.2, 131.6(a), 131.10); protection of each designated use through adoption of one or more criteria (40 C.F.R. §§ 131.2, 131.3(b), 131.6(c), 131.11(a)); and protection from degradation. 40 C.F.R. §§ 131.6(d) and 131.12. Water quality goals, such as the promotion of fish and wildlife "values" and "uses", are to be achieved through implementation of specific, scientifically ascertainable "criteria". See 40 C.F.R. §§ 131.2, 131.5, 131.6, 131.10, 131.11. These criteria provide objective standards for abating and controlling polluting discharges.

EPA's regulations further provide that § 303 standards must serve the dual purpose of (1) establishing the water quality goals for a specific water body, and (2) providing the regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by §§ 301 and 306 of the Act. 40 C.F.R. § 131.2. Thus, while "uses" must be designated in State WQS, including uses for aesthetics, fish and wildlife protection, and recreation, such uses must be promoted and protected under § 303(c) through specific State water quality criteria.

EPA allows criteria to be either numeric or narrative. In both formats, however, EPA requires that they must be based on a "sound scientific rationale." 40 C.F.R.

§ 131.11.²⁵ In other words, criteria must have a basis in objective fact. Otherwise they would provide no guidance to permit writers, enforcement authorities and individuals and entities who must comply with such standards.²⁶ In contrast, "uses" are not scientific parameters but societal objectives. Their significance under § 303 lies in their function as guides for the selection of scientifically ascertainable, and legally enforceable criteria.²⁷

Washington's water quality criteria applicable to this case, as set forth in WAC 173-201-045(1)(c), Resp. App. 100a, conform to the standards imposed by § 303 and EPA's regulations; and they have been approved by the EPA. The standards contain objective criteria which (in the case of *Class AA Waters* like the Dosewallips River) are designed to protect characteristic uses including "fish and shellfish reproduction, rearing, and harvesting" (WAC 173-201-045(1)(b)(v), Resp. App. 100a). The criteria do not regulate streamflow. Instead, they include measurable factors such as quantities of fecal coliform organisms; dissolved oxygen; dissolved gases; temperature; pH; turbidity; toxic, radioactive or deleterious material concentrations; and objectively ascertainable conditions that offend the senses of sight, smell, touch or taste. Nowhere in the record, however, is there any indication that any

²⁵ EPA is also required to promulgate "criteria for water quality accurately reflecting the latest scientific knowledge." 33 U.S.C. § 1314(a)(1). EPA's regulations pertaining to WQS criteria provide that "[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11. See also 40 C.F.R. § 131.6(f). A State may adopt in its WQS any water quality criteria which EPA proposes or "any other criteria for which they have sound scientific support." 48 Fed. Reg. 51,400 at 51,411 (1983). See also *Water Quality Standards Handbook*, p. 2-17 (Office of Water Regulations and Standards, EPA, 1983).

²⁶ Cf. *American Paper Institute, Inc. v. EPA*, 996 F.2d 346 (D.C. Cir. 1993) (sustaining EPA regulations requiring NPDES permit writers to use prescribed methodologies for translating narrative criteria into chemically specific limitations).

²⁷ 42 Fed. Reg. 56,792 (October 28, 1977).

of these objective criteria would be violated by any "discharge" that may result from the operation of the Elkhorn Project.

Section 401(a) requires a direct link between the particular discharge being examined under § 401 and the State's determination of compliance or non-compliance with the applicable water quality standards. The central objective of the 1972 Amendments to the FWPCA was to restructure the regulatory system around the control of polluting discharges.²⁸ Because discharges require an emission or outletting, the test for compliance with water quality standards necessarily must be based on whether the discharge is inconsistent with the criteria's objective standards for preventing deleterious changes in the quality of the receiving waters.²⁹

C. Washington's Antidegradation Policy Cannot Be Applied Independently Of The Criteria.

The Washington Supreme Court determined that the instream flows prescribed by the State DOE were necessary to prevent degradation of the Dosewallips under the antidegradation policy contained in Washington's water quality standards.³⁰ It relied on the determination of State fishery biologists that only such flows would provide

²⁸ *Arkansas v. Oklahoma*, — U.S. at —, 112 S. Ct. 1046, 1054-1055 (1992); *EPA v. California*, 426 U.S. 200, 202-308 (1976).

²⁹ In *Arkansas v. Oklahoma*, 112 S.Ct. 1046 (1992), the question presented was whether a direct discharge permit granted by EPA should be invalidated because the discharge violated the water quality standards of a downstream State. The Court ruled that there was no violation, in part because the EPA had determined that the discharge had not resulted in any *measurable* impacts on the levels of criteria pollutants or other relevant listed criteria factors in the waters of the downstream State. For example, the EPA found no detectable change under the phosphorus criterion that protected the aesthetic "use". *Id.* at 1059-60 & n.16.

³⁰ WAC 173-201-035(8)(a), Resp. App. 98a, one of several general guidelines in the Washington WQS, provides that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed."

a sufficient volume of water for the habitat of each fish species in the river (Pet. App. 7a-8a; 24a-27a).

The State's antidegradation policy implements EPA's § 303 regulations for State establishment of WQS. 40 C.F.R. §§ 131.6 and 131.12. Both the State standard and EPA's regulations must be read in the light of the statutory requirements in § 303. For purposes of § 303 WQS, a State's antidegradation policy must assure that in the formulation of such standards, the designated uses and the criteria that protect them do not result in the degradation of streams. The antidegradation policy contemplated in 40 C.F.R. § 131.12 relates to the establishment and revision of WQS and their application in particular permits.³¹ It cannot be applied under § 401 independently of the criteria "element" in § 303(c)(2)(A).³² To do so would establish by regulation an enforcement mechanism unconstrained by specific requirements Congress has adopted in § 303(c)(2)(A).

D. The Legislative History Confirms The Fundamental Regulatory Role Of Criteria.

The role of criteria as fundamental regulatory standards is clearly reflected in the legislative development of § 303. State WQS were initially authorized in § 5(a) of the 1965 Amendments, 79 Stat. 907. That provision amended the FWPCA by adding a new § 10 authorizing the States to "adopt (A) water quality *criteria* applicable

³¹ The role of antidegradation policy as a control on the revision of WQS, not an independent enforcement mechanism, is confirmed by § 303(d)(4)(B) as added by the Water Quality Act of 1987, Pub. L. No. 100-4, § 404(b), 101 Stat. 39, 67-69, 33 U.S.C. § 1313 (d)(4). This section is part of "anti-back sliding" provisions enacted to prevent the loosening of certain effluent limitations and other standards. It provides that, where water quality exceed levels necessary to protect designated uses, the applicable effluent limitations and WQS may be revised only if the revision is consistent with the antidegradation policy established under § 303.

³² See *Arkansas v. Oklahoma*, 112 S. Ct. at 1059 (upholding EPA's interpretation of Oklahoma's antidegradation standard that the standard "would only be violated if the discharge effected an 'actually detectable or measurable' change in water quality.")

to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted * * *." (emphasis added). The criteria and plan were subject to federal approval by the Secretary of Health, Education and Welfare. In establishing the standards, the Secretary and the State were to "take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses." FWPCA §§ 10(c)(1)-(3). Thus the original focus of water quality standards was on "criteria" that would have use and value for the multifarious applications of water in our society. When § 303 was revised and expanded in the 1972 Amendments to account for the new emphasis on controlling effluent discharges, the primary regulatory function of "criteria" was continued. See, e.g., H.R. Rep. 911, 92d Cong., 2nd Sess. 104-107, 1972 *Leg. Hist.* 791-794.³³ The 1972 Amendments enhanced the federal role under § 303 by providing for detailed supervision of standards by the EPA, including promulgation by the Administrator if a State failed to obtain EPA approval.

E. Section 303 Water Quality Standards Can Not Be Applied Directly To Regulate Streamflow Quantities.

Minimum streamflow conditions concern the amount of water that may be diverted and the amount that must be left in a stream. The flow conditions imposed in Tacoma's § 401 certificate were concerned with water quantity, not with water quality as defined by the appropriate criteria.

Water quality standards under § 303 do not speak to impacts on water quantities resulting from the effects on streamflow of dams and diversion structures. Water quantity issues are excluded from the CWA by §§ 101(g) and 510(2), 33 U.S.C. §§ 1251(g), 1370(2) (*supra* p. 7,

³³ The revision of the water quality standard provisions in the FWPCA originated in the House. S. Conf. Rep. 1236, 92d Cong. 2nd Sess. 122-124 (1972), 1972 *Leg. Hist.* 305-307.

n. 9), because Congress was concerned that the Act's federally controlled standards might interfere with proprietary water rights under State law. These provisions, like § 27 of the FPA,³⁴ prevent interference with the proprietary diversion of water.³⁵ *California v. FERC*, 495 U.S. 490 (1990).

Water quantity issues, particularly in western States, are inseparable from the appropriative rights doctrine, which permits the diversion or impoundment of water, as a property right, on the basis of prior appropriation and beneficial use. See, e.g., *California v. United States*, 438 U.S. 645, 653-663 (1978); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702-703 and 709 (1899).³⁶ Washington applies the doctrine of prior appropriation, and declares uses for hydroelectric power to be a beneficial use. RCW § 90.54.020 (Supp. 1992). See *Rettkowski v. Department of Ecology*, 122 Wash.2d 219, 858 P.2d 232 (1993), as modified by Order Changing Opinion, No. 59086-9 (Nov. 1, 1993).

Water is appropriated from streams by diverting or impounding it for consumptive (e.g., domestic water sup-

³⁴ Section 27 of the FPA, preserves state authority "relating to the control, appropriation, use, or distribution of water * * * or any vested right acquired therein." 16 U.S.C. § 821.

³⁵ Sections 101(g) and 510(2) apply to the entire CWA. Section 510 was included in the 1972 Amendments. Section 101(g) was added to the CWA in 1977 in order to expand to the entire Act the distinction between control of water quality and proprietary allocation of water quantity. Compare the Wallop Amendment (123 Cong. Rec. 26,762 (1977)), reprinted in Congressional Research Service, *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act* ("1977 Leg. Hist."), Serial 95-14, 95th Cong., 2d Sess. 1030 (1978), with the remarks of Senator Wallop on the final version of § 101(g) at 123 Cong. Rec. 39,211-39,212 (1977), 1977 Leg. Hist. 531-532 (distinguishing between water quality and water quantity).

³⁶ The appropriation doctrine as applied in the various western States is described in 2 *Waters and Water Rights*, Ch. 11-17 (Robert E. Beck ed. 1991).

plies and stock watering) and nonconsumptive uses (e.g., hydropower). The essence of the appropriation doctrine is that the prior appropriator may divert or impound the amounts to which it is entitled even if the quantities then available to junior appropriators are reduced. When diversion or impoundment for hydroelectric purposes occurs in an appropriative rights State such as Washington, the project owner must obtain the necessary water rights as a condition of its federal license.³⁷ The § 401 certificate in this case asserts that a State water right must be obtained prior to commencing construction of the project (Pet. App. 83a).³⁸

From the standpoint of impacts on water quantities, there is no relevant difference between the diversion of water for purposes of hydroelectric power generation and diversion for other appropriative uses. Both can affect the volume of water for fish habitat. Congress excluded water quantity issues from direct regulation under the federally controlled water quality standards authorized in § 303. Therefore neither the States nor EPA may regulate water quantity under § 303 water quality standards, whether the diversion involved results from a dam creating an impoundment, or a diversion structure like the weir being proposed for the Elkhorn Project.

³⁷ FERC's Standard License Condition Form L-4, which would apply to the Elkhorn Project, requires licensees to obtain necessary proprietary water rights. *Terms and Conditions for Unconstrued Major Project Affecting Navigable Waters of the United States*, Article 5, Order No. 540, 54 FPC 1792, 1824, 1826 (1975).

³⁸ No issue concerning conditions that might be attached to the State's water right permit is presented on this record. In Washington, the State DOE has no statutory authority to prioritize water rights or assure the State's public trust authority over the regulation of water resources. *Rettkowski v. the Department of Ecology*, supra p. 38. The Ninth Circuit has recently held, however, that a State water rights permit for an FERC licensed hydroelectric facility must be limited to the allocation of proprietary rights, and that environmental and ecological conditions are preempted under *California v. FERC*, 495 U.S. 490 (1990) and *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946). *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451 (9th Cir. 1993).

First, nothing in the text of § 303 authorizes application of its federally required water quality standards to regulate proprietary diversions of water quantities. The Washington Supreme Court believed it had found such authority in § 502(19)'s definition of pollution. The court held that under this broad definition, man-induced alteration of streamflow levels is "pollution" for purposes of Washington's water quality standards (Pet. App. 8a). The court erred. Section 502(19) provides: "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." A change in the quantity of the water in a stream is not a change in the "physical * * * integrity of water."³⁹ It is a change in the physical characteristics of the stream. Such a change in water quantities cannot be "pollution" under § 502(19) because the CWA applies only to water quality, not water quantity. Moreover, alteration of streamflow by a diversion or impoundment is not a "discharge" subject to State certification under § 401. By erroneously applying "pollution" policies to the Elkhorn Project's proposed water quantity diversion, the Washington Supreme Court disregarded Congress' decision to rely on discrete delegations and specific methodologies for dealing with "pollution". Since State powers are no broader than those conferred in those delegations and methodologies, § 303 could not be applied to regulate streamflow quantities.

Second, EPA's regulations governing State authority under § 303 expressly provide that "consistent with

³⁹ Moreover, the term "pollution" as defined in § 502(19) is not used in § 303 in any respect relevant to this case. Indeed, the term "pollution" is not used substantively in any of the other sections enumerated in § 401. The word "pollution" appears in § 303 only as (1) an adjective referring to the 1972 amendments to the FWPCA; (2) as an adjective describing state water pollution control agencies (§ 303(c)(1)); and (3) in § 303(d)(1)(A)'s provision requiring States to identify and classify waters for which certain effluent limitations are not stringent enough to implement any WQS.

§ 101(g) * * * of the Clean Water Act, water quality standards shall not be construed to supersede or abrogate rights to quantities of water." 40 C.F.R. § 131.4.

Third, the legislative history of WQS in the FWPCA confirms the distinction between water quality and water quantity. Senator Muskie was the sponsor and floor manager of S. 649, 88th Cong., 1st Sess. (1963), from which developed the WQS adopted in the 1965 Amendments.⁴⁰ He was questioned by Senator McGee on the floor of the Senate about the impact of the proposed WQS on proprietary water rights. Senator Muskie assured the Senate that western water rights would not be subjected to the standards being considered, stating: "S.649 does not affect those rights. We are concerned with water quality, not water quantity." 109 Cong. Rec. 49,678 (1963).

Finally, Congress was aware that there may be water quality consequences from the impacts on streamflow of dams and diversion structures. It did not provide direct regulation of such impacts, however. Instead, in § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F), Congress directed the EPA to publish information and guidelines dealing with changes in the flow of navigable waters (and ground waters as well) caused by the construction of dams and flow diversion facilities. EPA lists streamflow and dams among the physical parameters to be examined in order to identify *non-water quality* factors that may be limitations on "uses" for a water body. *Water Quality Standards Handbook*, p. 3-4 (Office of Water Regulations and Standards, EPA, 1983).

⁴⁰ The 1963 proposals developed into the 1965 Amendments. Although S. 649 passed the Senate, the House of Representatives took no action on the bill during the 88th Congress. The requirement for water quality standards was enacted by the 89th Congress. (Pub. L. No. 89-234, 79 Stat. 907-909). The difference between S. 649 and the 1965 Amendment related to whether federal or State authorities would initially promulgate the standards, the period for their establishment, and procedures for their review. See S. Rep. No. 556, 88th Cong., 1st Sess. 27 (1963).

Congress was also well aware that releases from licensed hydroelectric dams were subject to the FPA. It specifically transferred from the former Federal Power Commission to the EPA authority over one category of releases: those made from storage at a hydroelectric dam to regulate streamflow for the purpose of water quality control. Non-water quality releases remain FERC's exclusive responsibility. CWA § 102(b)(6), 33 U.S.C. § 1252(b)(6). Congress did not, however, confer storage release authority on the States in § 303 or any other provision enumerated in § 401.⁴¹

IV. SECTION 401(d)'s PROVISION FOR CONDITIONING WATER QUALITY CERTIFICATES ON "ANY OTHER APPROPRIATE REQUIREMENT OF STATE LAW" AUTHORIZES ONLY CONDITIONS APPROPRIATE TO DISCHARGES NOT IN COMPLIANCE WITH THE PROVISIONS ENUMERATED IN § 401(a).

The Supreme Court of Washington's conflation of "criteria" and "designated uses" led it to conclude that fish protection goals under its WQS (WAC 173-201-010, Resp. App. 94a) are "appropriate requirement[s] of State law" under § 401(d) that support minimum streamflow conditions in the State's § 401 certificates. Independently of its reliance on the State's § 303 WQS, the Washington Supreme Court erroneously concluded that § 401(d)'s grant of authority to the States to condition water quality certificates on "any other appropriate requirement of State law" provided federal authorization for

⁴¹ The Washington Supreme Court also relied on a letter to the FERC from an Assistant EPA Administrator (Pet. App. 8a). The letter simply describes the author's position that "protection of water quality involves far more than just addressing water chemistry." (Resp. App. 90a). But cf. *American Paper Institute, Inc. v. EPA*, 996 F.2d 346 (D.C. Cir. 1993). The letter does not support the Washington court's sweeping holding that because designated uses and the prevention of the degradation of water quality are part of a State's WQS under § 401, water quantity may be treated as a water quality issue, or that a release may be found to be inconsistent with WQS on the basis of uses alone.

the State DOE to impose streamflow conditions in the § 401 certificate under RCW 90.54.020(3)(a) (Supp. 1992), because it found that such conditions were "water quality-related." (Pet. App. 10a; 13a).⁴² That statute provides that "[p]erennial rivers and streams of the State shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."

The Court based its holding on its construction of the term "appropriate" in § 401(d). It construed that term as having a breadth equivalent to that of the CWA's stated purpose, as stated in the Act's Declaration of Goals and Policy, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This reliance on the general preamble of the CWA rather than the specific terms in § 401(d), ignores the context and relationship of the phrase "other appropriate requirement of State law" to the other provisions enumerated in § 401.⁴³

A simple question should be asked concerning the "other appropriate requirement of State law" clause in § 401(d): "appropriate to what?" The answer required by the statute is appropriate to the compliance of "discharges" with applicable water quality criteria. State laws regulating such diversions, and conditions limiting such diversions, are not "appropriate" within the meaning of § 401(d). The Washington Supreme Court's disregard of the "discharge" limitation caused it to apply § 401(d) to implement any water quality-related State law deemed to control "pollution," even though the condition it imposed was totally unrelated to ensuring compliance with the State's water quality criteria for a Class AA stream.

⁴² The court's standard of "water quality-related" has a breadth that expands the reach of State certification authority under § 401 far beyond the scope of the CWA.

⁴³ It is well settled that a declaration of policy in a statute does not give rise to independent legal obligations, but merely provides assistance in interpreting those obligations. *Association of Am. R.R. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977).

It is a familiar principle of statutory construction that when general words like "other appropriate requirement" follow specific terms, then "[u]nder the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it." *Cleveland v. United States*, 329 U.S. 14, 18 (1946). By relying on the broad goals of the Act, rather than the specific terms associated in § 401(d), the State court has given the phrase "any other appropriate requirement of State law" a breadth that swallows what precedes it, leaving § 401(d) limited only by the requirement that conditions thereunder be related in some way to water. Cf. *Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990).⁴⁴ The sweep of this construction effectively transfers to the States comprehensive authority over the streamflow quantities from hydroelectric projects subject to license under the FPA.

The court attempted to buttress its construction by asserting that the term "appropriate" could not have been limited by water quality standards in § 303 because that section is not enumerated in § 401(d) (Pet. App. 11a-12a). This view is mistaken. Section 301—which is specifically enumerated—expressly incorporates, through subsection 301(b)(1)(C), WQS under the CWA, *i.e.*, under § 303.

The legislative history of § 401 confirms this reading. In the 1977 Amendments to the CWA, Congress made clear that compliance with State WQS was a required element of a § 401 certificate by inserting § 303 whenever §§ 301, 302, 306 and 307 appeared.⁴⁵ This concise formulation, however, had the effect of omitting § 303 from § 401(d), because in subsection (d) the sequence of the

⁴⁴ See also *Hughey v. United States*, 495 U.S. 411, 418-419 (1990); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973).

⁴⁵ Pub. L. No. 95-217, § 64, 91 Stat. 1599, provided: "Section 401 of the Federal Water Pollution Control Act is amended by inserting '303,' after '302,' in the phrase 'sections 301, 302, 306, and 307 of this Act', and in the phrase 'section 301, 302, 306 or 307 of this Act', each time these phrases appear."

enumerated sections was interrupted by words describing those sections (Pet. App. 139a). The omission was without significance because, in the words of the Conference Report on the 1977 Amendments, "[s]ection 303 is always included by reference where section 301 is listed."⁴⁶ Thus, contrary to the Washington Supreme Court, the omission of § 303 from § 401(d) did not reflect a legislative purpose to make the State's ability to condition a water quality certificate under § 401(d) unlimited and unconstrained by its authority to deny it under § 401(a).

As the Court of Appeals of New York has ruled, the "appropriate state law" provision in § 401(d) does not "countermand the carefully worded authority of subsection 401(a)(1)."⁴⁷ Any condition imposed must be designed to achieve compliance by a particular discharge with the sections of the CWA enumerated in § 401(a)(1). The only subsection relevant here is § 303. A state law is "appropriate" to § 303 WQS only if it provides scientifically ascertainable criteria to guide conditions on discharges under § 401.

The standard of "appropriateness" in § 401(d) also refers to state laws preserved under § 510(1), 33 U.S.C. § 1370(1). That statute provides that "nothing in *this* Act shall (1) preclude or deny the right of any State to * * * adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting abatement or control of pollution; * * *." (emphasis added). If limitations and standards under the CWA are in effect, such laws may not be less stringent than the CWA standards. *Id.* Section 510(1) thus preserves State laws for the abatement of pollution from preemption by the CWA. It does not render those laws automatically "appropriate" to the control of discharges for purposes of § 401. Moreover, § 510(1) does not pre-

⁴⁶ H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), 1977 Leg. Hist. 280.

⁴⁷ *Niagara Mohawk Power Corp. v. New York State Dep't of Env'tl. Conservation*, No. 214, slip op. at 10 (N.Y. Nov. 11, 1993).

vent preemption by the FPA, under *First Iowa* and *California v. FERC*, of State laws whose application to hydroelectric projects is outside the scope of § 401.

V. WASHINGTON'S EXPANSIVE READING OF § 401 WOULD SUBVERT THE FPA'S COMPREHENSIVE LICENSING SCHEME.

Regulation of the use of water in navigable streams is the heart of the federal licensing scheme in Part I of the FPA. The scheme requires FERC to balance hydroelectric uses with the many other purposes served by such streams. FERC must carefully consider energy conservation, navigation, irrigation, flood control, water supply, fish and wildlife protection, recreational opportunities and other aspects of environmental quality, as well as power needs. Under FPA § 10(j), 16 U.S.C. § 803(j), it must—not may—include conditions adequate to protect, mitigate damages to, and enhance fish and wildlife in any license it grants. Section 10(j) also requires FERC to accept conditions recommended by State and federal fish and wildlife agencies, unless it finds such conditions to be inconsistent with the purpose and requirements of the Act. The Washington Supreme Court's misapplication of § 401 preempts FERC's opportunity to make such findings, and thus completely frustrates § 10(j)'s careful preservation of FERC's ability to reject wildlife agency recommendations when necessary.⁴⁸

When, in CWA § 401, Congress delegated to the States narrowly defined authority to certify that discharges into navigable waters comply with approved water quality standards under § 303, it never intended to subject FERC licensees to two masters. It would have made no sense for Congress to superimpose on the already complex federal licensing scheme in the FPA a duplicative and expensive layer of State regulation. Such legislation would

⁴⁸ See *United States Dep't of Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992) ("Even where the fish and wildlife agencies make formal section 10(j) recommendations, those agencies have no veto power.").

have fragmented control of the hydropower licensing process among the 50 States, and reversed Congress' decision in the 1920 Federal Water Act to place exclusive control over private hydroelectric facilities in a single federal agency. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946); *California v. FERC*, 495 U.S. 490 (1990).

There is no indication in the language, structure or history of § 401, or its statutory predecessor, § 21(b) of the FWPCA, that when Congress delegated limited authority to the States to certify that discharges from federally licensed activities will comply with State WQS approved by the EPA, it also was authorizing the States to preempt FERC's responsibility for prescribing streamflow quantities necessary to protect fish and wildlife under § 10 of the FPA.

The Washington Supreme Court's construction of § 401 achieves the fragmentation of hydroelectric licensing that Congress eschewed. It invites States unilaterally to impose onerous conditions, in the name of local environmental concerns, that will drastically reduce FERC's control over the licensing process and, ultimately, the reliability of hydroelectric facilities in the nation's power grid. Washington's broad reading of § 401 as applied to hydroelectric projects amounts to a partial repeal of the FPA by implication. Repeals by implication are disfavored. To the maximum extent possible, courts must read related statutes together in order to give effect to each; only when the sense and purpose of each cannot be preserved by such a reading is implied repeal recognized. *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (citing *Morton v. Mancari*, 417 U.S. 535, 549 (1974)). Congress intended that, except for State certification that discharges comply with WQS and other § 401 limitations, all other environmental and ecological issues should continue to be resolved by a single federal tribunal, FERC, under Part I of the FPA.

More than four decades have passed since the Court in *First Iowa* struck down a State's attempt to impose a

broad State permitting requirement on a hydroelectric project under the jurisdiction of the FPC. The Court then stated that requiring the applicant to secure a State permit would "vest in [State authorities] a veto power over the federal project" that could "destroy the effectiveness of the federal act" and "subordinate to the control of the State the 'comprehensive' planning" with which the FPC was charged. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 164 (1946). The validity of the *First Iowa* holding has been reaffirmed by the Court on numerous occasions.⁴⁹ Its significance here is that State-imposed conditions included in a § 401 certificate but outside the scope of CWA § 401 have the same adverse impact on the scheme of the FPA as conditions otherwise imposed under State law.

The Court recently followed *First Iowa* when it rejected a State's attempt to justify streamflow conditions in a water permit on the basis of FPA § 27, 16 U.S.C. § 821. The FPA's § 27, like §§ 101(g) and 510 of the CWA, preserves State authority to allocate proprietary water rights. *California v. FERC*, 495 U.S. 490 (1990). The Court pointed out that Congress, in its 1986 Amendments to the FPA,⁵⁰ had the opportunity to alter FERC's role *vis-à-vis* the States, but chose instead "to elaborate and reaffirm *First Iowa's* understanding that the FPA establishes a broad and paramount federal regulatory role." 495 U.S. at 499.

The 1986 Amendments included a proviso in § 4(e) requiring FERC to give equal consideration, in addition to power and development purposes, to protection and enhancement of fish spawning grounds and habitat. They also mandated, in § 10(j), specific conditions for such

⁴⁹ *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n.6 (1982); *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958); *FPC v. Oregon*, 349 U.S. 435, 444-45 (1955).

⁵⁰ Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243 (1986).

protection and enhancement. These requirements were enacted some fourteen years after § 401 of the CWA. Congress would not have added these provisions to the FPA if the States already had the authority to impose, as water quality conditions under § 401, mandatory streamflow quantities for fish and wildlife purposes. Cf. *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451, 455-456 (9th Cir. 1993) (holding that the FPA preempts State authority to impose numerous environmental conditions on a licensed project's proprietary water right certificate). Washington's base flow statute, RCW 90.54.020(3)(a) (Supp. 1992), requiring minimum flows for fish and wildlife, scenic and aesthetic, and other environmental values and navigational values, unquestionably would be preempted under *First Iowa* and *California v. FERC*, if it had been applied independently of the federal authority over discharges delegated to the States in CWA § 401.⁵¹ There is no basis for concluding that when Congress adopted § 401, it unwittingly overruled *First Iowa*, and authorized the States to determine the quantities of water that a federally licensed hydroelectric project may use. *Niagara Mohawk Power Corp. v. New York State Dep't of Env'tl. Conservation*, No. 214 (N.Y. Nov. 11, 1993).

⁵¹ The Washington Supreme Court erroneously concluded that the conditions in the § 401 certificate were required by the federal requirements in §§ 401 and 303 (Pet. App. 14a-21a).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Washington should be reversed.

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No. 92-1911

Supreme Court, U.S.

FILED

DEC 13 1993

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**IN THE
SUPREME COURT
OF THE
UNITED STATES**

OCTOBER TERM, 1993

**PUD NO. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,
Petitioners,**

v.

**STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY, DEPARTMENT OF FISHERIES,
AND DEPARTMENT OF WILDLIFE,
Respondents.**

**On Writ of Certiorari to the
Supreme Court of the State of Washington**

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Section 401 of the Clean Water Act authorizes states to impose conditions in water quality certificates as necessary to ensure that discharges from federally licensed activities comply with state water quality standards and with "any other appropriate requirement of state law." 33 U.S.C. § 1341. The question presented is:

Whether § 401 authorizes the State of Washington to impose minimum instream flow requirements on an applicant for a license from the Federal Energy Regulatory Commission to conduct and operate a hydroelectric project, when discharges resulting from that project would, by reducing a river's flow, injure existing uses (in this case use by salmon and steelhead) in violation of the State's water quality standards.

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STATEMENT OF THE CASE

On June 11, 1986, the Washington State Department of Ecology (Ecology) issued a water quality certificate to Petitioners, the City of Tacoma and PUD No. 1 of Jefferson County, for the proposed Elkhorn Hydroelectric Project. The certificate was issued pursuant to § 401 of the Clean Water Act (CWA).¹ The § 401 certificate contained a condition requiring Petitioners to maintain a certain minimum instream flow to protect rapidly diminishing runs of salmon and steelhead in the Dosewallips River. The minimum flow condition allows Petitioners to utilize the majority of the river's water for hydroelectric development, but requires that adequate water be released at the proposed dam to preserve salmon and steelhead in the affected portion of the river. Petitioners challenge the validity of the State's § 401 certification, which the Washington State Supreme Court upheld.

I. THE DOSEWALLIPS RIVER

The Dosewallips River originates in the glaciers of the eastern Olympic Mountains and flows east to Hood Canal in western Puget Sound. The river is pristine and undeveloped, with its upper half located in Olympic National Park. The proposed Elkhorn diversion dam will be located immediately adjacent to the park boundary.

Salmon and Steelhead trout (steelhead) currently inhabit the Dosewallips River. (Pet. App. 48a-49a.) The upper portion of the river, where the Elkhorn project is to be located, supports Chinook and Coho salmon and steelhead. These fish spend varying amounts of time in the river after hatching from their

¹ 33 U.S.C. § 1341 (1988).

eggs and then migrate down river to the Puget Sound and then to the Pacific Ocean. Several years later they return as adults, migrate upriver, and spawn, thereby continuing the species.² These fish were once numerous in the Dosewallips River, but are now declining at an alarming rate. The spring and fall Chinook runs are considered by the American Fisheries Society to be at a high risk of extinction.³ The winter steelhead run is listed as "depressed" by state and tribal fishery agencies.⁴

The State regulates water quality of the Dosewallips River under Wash. Rev. Code (RCW) ch. 90.48 (1992), which is Washington's primary water quality statute. The chapter authorizes Ecology to promulgate regulations, including "standards of quality for waters of the state,"⁵ and to implement state authority under the CWA,⁶ including the establishment of water quality standards. RCW 90.48.260(1)(b).

Washington's water quality standards classify all of the State's waters in categories ranging from Class AA (extraordinary) to Class C (fair).⁷ For each class a range of

² See generally Transcript (TR) Day Two, 74-90 (describing life cycle of Chinook and Coho salmon) and TR Day Two, 160-61 (describing life cycle of steelhead).

³ Willa Nehlsen *et al.*, *Pacific Salmon at the Crossroads: Stocks at Risk From California, Oregon, Idaho, and Washington*, 16 Fisheries Vol. 2 at 10 (March-April, 1991).

⁴ Washington Department of Fisheries *et al.*, 1992 *Washington State Salmon and Steelhead Stock Inventory* 122 (March, 1993).

⁵ RCW 90.48.035 (1992).

⁶ 33 U.S.C. §§ 1251-1387 (1988).

⁷ The water quality standards applicable to the Elkhorn project are included as Appendix A. The version of the water quality standards attached to our Brief in Opposition to Petition for Writ of Certiorari, (App. L, pp. 94a-127a) was not in effect on June 11, 1986, and therefore was not applicable to the Elkhorn project. We regret the error.

"characteristic" uses is defined. Wash. Admin. Code (WAC) 173-201-045 and -080 (1992). The standards then set numeric and narrative water quality criteria for each classification of water body. Finally, the standards contain a number of general requirements, including an antidegradation policy. WAC 173-201-035 (1992).

Washington's water quality standards classify the Dosewallips River as Class AA (extraordinary). WAC 173-201-080(32). The characteristic uses of Class AA waters include salmonid and other fish "migration, rearing, [and] spawning." WAC 173-201-045(1)(b). The State's antidegradation policy is set forth at WAC 173-201-035(8). It reads, in part, as follows:

The antidegradation policy of the state of Washington, as generally guided by chapter 90.48 RCW, Water Pollution Control Act, and chapter 90.54 RCW, Water Resources Act of 1971, is stated as follows:

(a) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

* * * * *

(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term and irreparable harm to the environment.

II. THE PROPOSED ELKHORN HYDROELECTRIC PROJECT

The proposed Elkhorn Hydroelectric Project will consist of a diversion dam, which will divert most of the water in the Dosewallips River into a large tunnel. This tunnel, also called a penstock, will parallel the river for 1.2 miles and then direct the diverted river water into a powerhouse. There, the water

will pass through turbines, generating electricity. The water will then be discharged back into the river channel through the tailrace. The 1.2-mile river segment between the dam and the tailrace is referred to as the bypass reach.

The diversion dam will be ten feet high and fifty feet across and will completely block the flow of the river.⁸ The dam will not create a reservoir, but will increase the river's surface area behind the dam by approximately .5 acres.⁹ At the dam, the majority of river water will be diverted into the penstock. However, some river water will be passed through the dam by sluice gate or through a fish ladder into the river channel below.

Excluding the driest months of the year when the Elkhorn project usually will not operate, the project as proposed by Petitioners will reduce the flow in the river, on average, by approximately 75%.¹⁰ This reduction in flow will reduce habitat available to salmon and steelhead for rearing, migration, and spawning. The court below ruled that the project, with the minimum flows proposed by Petitioners, will reduce available habitat to such an extent that continued use of the bypass reach by salmon and steelhead will be adversely affected or eliminated. (Pet. App. 8a.) This factual finding is not challenged by Petitioners.

⁸ Pollution Control Hearings Board (PCHB) Ex. A-4, pp. E2-11.

⁹ PCHB Ex. A-4, pp. E2-11. The dam "will influence * * * the surface profile of the river for a distance of about 300 feet upstream."

¹⁰ PCHB Ex. R-3. The minimum instream flow required by the State will result in an average flow reduction of 60%.

III. PROCEEDINGS BELOW

Under the Federal Power Act (FPA), 16 U.S.C. § 791 *et seq.*, (1988 and 1992 Supp.), the Federal Energy Regulatory Commission (FERC) possesses the authority to license new hydroelectric projects. Under § 401 of the CWA, 33 U.S.C. § 1341, however, applicants for FERC licenses whose activities may result in a discharge into navigable waters of the United States must first obtain from the state a certification that the activity will comply with water quality requirements described in § 401. Section 401(d) of the CWA authorizes the state to impose limitations on the certification and further provides that those limitations "shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d).

Because Petitioners' proposed Elkhorn Hydroelectric Project will cause a discharge into navigable waters, Petitioners sought a § 401 certification from the State prior to obtaining a license from FERC under the FPA. To that end, Petitioners began working in 1982 with experts from Ecology, the Washington State Departments of Fisheries and Wildlife, the U.S. Fish & Wildlife Service, the National Marine Fisheries Service, and the Point No Point Treaty Council (a consortium of Indian tribes that have historically fished in the Dosewallips River and Hood Canal) to identify a minimum flow that would protect salmon and steelhead in the Elkhorn project's bypass reach. Petitioners and the agencies agreed to conduct an instream flow, incremental method (IFIM) study, which all parties agreed was the "state of the art" methodology for identifying an appropriate minimum flow. (Pet. App. 49a.)

At the conclusion of the study, all parties attempted to reach agreement with regard to the necessary minimum flow. In October 1985, the agency experts identified the minimum flow that they believed to be the minimum necessary to preserve and protect the bypass reach as viable habitat for salmon and steelhead. The actual volume of the minimum flow varies by month to provide adequate protection to the species (Chinook, Coho or steelhead) and life stage (egg, smolt, adult) of such species present in the river during each month.¹¹

On June 11, 1986, Ecology issued a water quality certificate for the Elkhorn project. The certificate includes a condition requiring the minimum flow agreed to by the agency experts.¹²

Petitioners appealed the § 401 certificate to the Pollution Control Hearings Board (PCHB).¹³ On motions for summary judgment, the PCHB ruled that the minimum flow condition is

¹¹ PCHB Ex. R-3.

¹² The § 401 certificate contained a statement that the minimum flows required by Ecology "are in excess of those required to maintain water quality in the bypass region." (Pet. App. 83a.) In light of the Washington Supreme Court's ruling that the minimum instream flow required by the State is necessary to ensure compliance with state water quality standards (Pet. App. 7a), this statement is completely irrelevant. Petitioners contend nonetheless, that, by this statement, Ecology has conceded that the minimum flow is not related to water quality. As we have explained previously, an affidavit was filed by the author of this language in which he explained that the reference to the term "water quality" in the contested phrase was a reference to water temperature only. The affidavit states:

[W]hen I stated that the flows are in excess of those required to maintain water quality, I meant that the flows are more than are necessary to ensure compliance with the applicable water quality standards for temperature.

Resp. App. 88a. Thus, Ecology has not conceded that the minimum flow is not related to water quality. Ecology's only concession is that the minimum flow is not necessary to ensure the Elkhorn project's compliance with water temperature standards.

¹³ The PCHB is a quasi-judicial administrative board with jurisdiction to hear appeals from final decisions of Ecology. RCW 43.21B.110 (1992).

appropriate under § 401 and under state water quality laws. Specifically, the PCHB ruled that the minimum flow condition is necessary to ensure the Elkhorn project's compliance with RCW 90.54.030(2)(a) (1992) (requiring base flows to protect, *inter alia*, fish and wildlife) and that this state law is an "other appropriate requirement of state law" under § 401(d).¹⁴ Furthermore, the PCHB rejected Petitioners' argument that the FPA preempts the minimum flow requirement. (Pet. App. 71a.)

On December 15-18, 1988, the PCHB held a hearing in this matter. The issues at the hearing were 1) what fish species, if any, inhabit the bypass reach, and 2) whether the flow required by Ecology was "appropriate for the preservation of the fishery resource" in the Dosewallips River. (Jt. App. 16.) The PCHB held that Coho and Chinook salmon and steelhead inhabit the bypass reach. (Pet. App. 49a.) The PCHB also ruled that the minimum flow required by Ecology would enhance the Dosewallips River for fish and, therefore, was inappropriate under state law. (Pet. App. 50a-51a.)

On February 24, 1989, the State and Petitioners both appealed the PCHB's decision to Thurston County Superior Court. The superior court affirmed the PCHB's ruling that the minimum flow condition is authorized by § 401 and that the minimum flow condition is not preempted by the FPA. (Pet. App. 39a-42a.) The superior court reversed the PCHB's enhancement ruling, finding it to be clearly erroneous. (Pet. App. 34a.)

¹⁴ Pet. App. 80a. The PCHB held that any state law related to water quality is an "appropriate" requirement of state law under § 401(d), and that RCW 90.54.030(2)(a) is related to water quality. The PCHB concluded, therefore, that a condition designed to ensure the project's compliance with this state law is valid under § 401(d). Pet. App. 78a-80a.

Petitioners appealed the superior court's decision to the Washington Supreme Court. The Washington Supreme Court unanimously affirmed. The court ruled that the minimum flow is necessary to ensure the Elkhorn project's compliance with state water quality standards, and that conditions that are necessary to ensure a project's compliance with water quality standards are appropriate under § 401(d).¹⁵ (Pet. App. 7a-8a.) The court also held that the minimum flow is necessary to ensure the Elkhorn project's compliance with RCW 90.54.030(2)(a). (Pet. App. 10a-14a.) The court reasoned that this provision of state law is related to water quality and is, therefore, an "appropriate requirement of state law" under § 401(d), upon which the minimum flow condition could validly be based.

Finally, the court ruled that the minimum flow requirement is not preempted by the FPA. (Pet. App. 21a.) The court reasoned that issuance of a water quality certificate pursuant to § 401, with conditions designed to ensure compliance with water quality standards required by § 303 of the CWA¹⁶ and approved by the Environmental Protection Agency (EPA),

cannot be fairly regarded as state action for purposes of the application of federal preemption. Simply put, [the] federal preemption doctrine does not apply in a context where a state is acting to fulfill its federally mandated role in the comprehensive federal scheme embodied in the [CWA].

(Pet. App. 16a-17a.) The court also ruled that, even if the threshold requirement of state action were present, a finding of

¹⁵ In reaching this conclusion, the court noted that Petitioners conceded in their argument before the court that conditions designed to ensure compliance with water quality standards are appropriate under § 401. Pet. App. 7a.

¹⁶ 33 U.S.C. § 1313.

preemption would not be appropriate as no conflict exists between the minimum flow condition and any federal action, and given § 401, it clearly cannot be the case that the FPA has occupied the field so as to preclude a state action. (Pet. App. 17a-21a.)

SUMMARY OF ARGUMENT

The judgment of the state supreme court should be affirmed because § 401 of the CWA authorizes the State to condition its certification of the Elkhorn project on that project's complying with minimum instream flow requirements necessary to ensure compliance with the State's water quality standards. Petitioners concede that § 401 applies to the Elkhorn project because it will result in "discharge into the navigable waters" and Petitioners further concede that the State is authorized to impose conditions necessary to ensure that those discharges do not violate the State's water quality standards. The issue in this case then is whether § 401 allows the State to impose a minimum instream flow condition without which the Elkhorn project will violate state water quality standards. Petitioners claim that such a condition is outside the scope of § 401. Their contention cannot be squared with the plain meaning of the statutory language, its legislative history, or with EPA's long-standing administrative construction of § 401.

1. The State's minimum instream flow requirement falls within the plain terms of § 401(d) because it is a "limitation" necessary to ensure that the Elkhorn project complies with state water quality standards. See 33 U.S.C. § 1341(d). Petitioners are not contesting before this Court the lower court's findings that, absent the state-imposed minimum flow requirement, the Elkhorn project will interfere with or injure salmon and steelhead

migration, rearing, and spawning in violation of state water quality standards. Consequently, the validity of the State's action in this case is clear.

2. Under the CWA, and § 401 specifically, states must ensure compliance with all of their water quality standards and are not, as Petitioners argue, limited to enforcing their water quality criteria. EPA's water quality standard regulation, 40 C.F.R. pt. 131 (1992), implements § 303 of the CWA, and requires that state water quality standards consist of designated uses, water quality criteria, and an antidegradation policy. Washington's water quality standards include these three components. Washington's antidegradation policy, consistent with EPA's requirements (40 C.F.R. § 131.12), prohibits degradation of water quality that interferes with or injures existing water uses. The Elkhorn project will violate the State's antidegradation policy, which is an integral and independently enforceable part of Washington's standards, by injuring existing water uses. The State's minimum instream flow requirement is valid under § 401 because it is necessary to prevent that injury, and thereby, bring the Elkhorn project into compliance with state water quality standards.

3. Section 401 does not limit the State to ensuring compliance with water quality standards. Section 401(d) further authorizes the states to impose conditions necessary to ensure compliance within "any other appropriate requirement of state law." Because RCW 90.54.030(2)(a), which requires minimum instream flows to protect, *inter alia*, fish and wildlife, is reasonably related to the policies and purposes of the CWA, it is an "appropriate" state law requirement, within the meaning of § 401(d). The minimum instream flow requirement is valid

therefore, because it is necessary to ensure the Elkhorn project's compliance with this "appropriate requirement of state law." 33 U.S.C. § 1341(d).

4. Congress intended that states perform a broad review of all of a facility's "discharges" under § 401. Congress used "discharge" without qualification in § 401, pointedly declining to use the more narrow term "discharge of a pollutant." Thus, § 401 authorizes state review of any discharge which may cause "pollution" of the affected water body, which the Act broadly defines to include any man-induced or man-made alteration of the chemical, physical, or biological integrity of water. See 33 U.S.C. § 1362(19).

—The Elkhorn project will result in numerous discharges causing pollution, including pollution that will violate the State's water quality standards. The most fundamental of these is the dam itself, constituting as it does, a massive and permanent addition of material into the water. This discharge will cause pollution by obstructing and reducing the river's flow. The State's minimum instream flow requirement directly addresses this discharge-caused pollution. In addition, construction and operation of the Elkhorn project will cause a number of discharges of pollutants and non-point source pollution. Each of these discharges trigger § 401, which authorizes the State to ensure that each of these discharges and the pollution they cause will comply with applicable water quality requirements — most importantly, water quality standards.

5. The State's exercise of authority in this case is not preempted by the FPA. Indeed, it cannot be, because the State here, unlike California in *California v. FERC*, 495 U.S. 490 (1990), is not claiming its right as a matter of state law, but

instead as a matter of federal law under § 401. Nor, unlike in *California v. FERC*, is the State seeking unilaterally to impose its state minimum instream flow requirement in a pre-existing FERC license.

The State's authority under § 401 is more properly analogized to the Secretary of the Interior's authority under § 4(e) of the FPA (16 U.S.C. § 797(e)), which FERC unsuccessfully challenged in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). Section 4(e), like § 401, reflects congressional intent to allow decisionmakers other than FERC to "protect the resources under their respective jurisdictions" by assigning them the authority to dictate certain conditions to be included in a FERC license. 466 U.S. at 775. That congressional policy determination was controlling in *Escondido* and is equally controlling here.

ARGUMENT

I. SECTION 401 AUTHORIZES THE IMPOSITION OF CONDITIONS, INCLUDING MINIMUM INSTREAM FLOW CONDITIONS, ON A WATER QUALITY CERTIFICATE WHEN SUCH CONDITIONS ARE NECESSARY TO PREVENT VIOLATIONS OF STATE WATER QUALITY STANDARDS THAT WERE APPROVED BY EPA PURSUANT TO SECTION 303 OF THE CLEAN WATER ACT

Petitioners contend (Pet. Br. 19-21) that the outcome in this case is controlled by congressional intent in the Federal Power Act of 1920 to confer on FERC (then the Federal Power Commission) exclusive authority over the licensing of hydroelectric projects in navigable waters of the United States. Petitioners are mistaken. The outcome in this case does not turn on the meaning of the FPA. It turns on what Congress intended when it enacted the CWA over fifty years later. More

particularly, the only question before this Court concerns the meaning of § 401 of the CWA, 33 U.S.C. § 1341, which, we contend, evinces clear congressional intent to authorize states to impose conditions in § 401 certificates when necessary to prevent violations of state water quality standards. This includes the authority to require that a FERC-licensed hydroelectric project maintain a minimum instream flow where, as here, such a flow is necessary to prevent violations of state water quality standards.

The dispute between the parties regarding the meaning of § 401 is far narrower than Petitioners' rhetoric suggests. Notwithstanding Petitioners' claims (Br. 19) of "FERC's pervasive jurisdiction," Petitioners do not in fact dispute that § 401 authorizes a state to impose many kinds of water pollution controls on the proposed construction and operation of a hydroelectric facility. Nor do they dispute that FERC must include those conditions in the federal license. (Pet. Br. 31.)

There is likewise no dispute, before this Court at least, regarding the actual water quality impacts of the construction and operation of the Elkhorn project. Petitioners are not challenging the findings of fact made below regarding the significant adverse impacts on water quality that would result absent the minimum instream flow requirements imposed by the State under § 401. The court below ruled that, in the absence of the minimum instream flow required by the State, the Elkhorn project would cause harm to fish migration, rearing, and spawning. (Pet. App. 8a.) These uses are "uses" formally designated by the State, and formally approved by EPA, for the affected waters pursuant to § 303 of the CWA. See 33 U.S.C. § 1313. The court further ruled that such harm constitutes degradation of state waters in contravention of the State's antidegradation policy, which is also

part of the State's water quality standards developed, and approved by EPA, pursuant to § 303. (Pet. App. 8a.)

Rather than challenge these judicial findings, Petitioners claim that, notwithstanding § 401's applicability to the Elkhorn project, the State is powerless to address the Elkhorn project's adverse water quality impacts. Petitioners posit (Pet. Br. 20) that "the determination of streamflow quantities to protect fish habitat at hydroelectric projects is outside the scope of § 401." The courts below correctly rejected this claim. Section 401 contains no loophole for federally licensed activities that violate state water quality standards by reducing the flow of navigable waters. Water "pollution," within the meaning of the CWA, can result from flow reduction as much as it can from the addition of pollutants. Either may result in a "man-made or man-induced alteration of the chemical, physical [and] biological * * * integrity of water." 33 U.S.C. § 1362(19). Indeed, that is precisely the result of Petitioners' proposed flow reductions in this case. They will degrade water quality and result in a diminution of fish species in violation of water quality standards. Prevention of this form of pollution, and consequent violations of water quality standards through minimum instream flow requirements, is no less valid than the imposition of effluent limitations to restrict the addition of pollutants.

In support of our view, we rely on the plain meaning of § 401's statutory language, the statutory design, the relevant legislative history, and the long-standing construction of that provision by EPA, which is the federal agency responsible for its administration. All show that Congress intended in § 401 to provide states with broad authority to ensure that federally licensed activities do not violate state water quality standards.

A. Section 401's Plain Meaning Authorizes States To Ensure Compliance With State Water Quality Standards By Imposing Limitations on Flow Reductions

1. Petitioners do not dispute that a state's certification authority under § 401 extends to ensuring compliance with state water quality standards.¹⁷ Nor could they. Under the plain terms of § 401, the State's water quality standards are clearly a proper basis for denying or conditioning state certification. Section 401(a)(1) expressly states that noncompliance with § 303 water quality standards is grounds for denial of a § 401 certificate. Section 401(d), moreover, makes state water quality standards appropriate bases for conditions in § 401 certificates. These standards were developed by the State and approved by EPA¹⁸ pursuant to § 303, and therefore constitute an "applicable limitation * * * under section 301" of the Act, which incorporates by express reference the requirements of § 303. See 33 U.S.C. § 1341(d).¹⁹

¹⁷ Pet. App. 7a ("The parties agree that state water quality standards qualify as appropriate requirements of state law for purposes of section 401(d), and so may serve as the source for conditions imposed in the section 401 certificate."). (Emphasis added.) See also Pet. Br. 9 ("Water quality standards under CWA § 303 are among the provisions on which a State may base compliance conditions under § 401(d).")

¹⁸ Washington's water quality standards are patterned closely after EPA's requirements, including designated uses, water quality criteria (both numeric and narrative), and an antidegradation policy. EPA approved Washington's standards in 1974. See 42 Fed. Reg. 56,792 (1977).

¹⁹ As originally enacted, § 401(a)(1) listed §§ 301, 302, 306, and 307 as provisions of the Act with which states were required to ensure compliance. In 1977, a reference to § 303 was added to § 401(a)(1). Clean Water Act of 1977, Pub. L. No. 95-139, 91 Stat. 1566 (1977). The Conference Report explained that this change was simply a clarification and not a substantive change in the law. The report further explained that compliance with § 303 water quality standards was always required under § 401 because of its reference to § 301, which incorporates water quality standards promulgated under § 303. "Section 303 is always included by

The legislative history, moreover, reveals that maintaining compliance with state water quality standards was § 401's primary purpose. The legislative history includes numerous references to state water quality standards in discussing the scope of state authority under § 401. For example, the Conference Report accompanying the 1972 legislation states "the Conferees agreed that a State may attach to any Federally issued license or permit such conditions as may be necessary to assure compliance with water quality standards in that State."²⁰ Indeed, Congress felt so strongly about the importance of the states' ability under § 401 to ensure compliance with state water quality standards that Congress amended § 401 in 1977 for that very purpose: to remove any possible doubt "that state water quality standards would be imposed through § 301, and thus certification by the State would include consideration of water quality standards." S. Rep. No. 370, 95th Cong., 1st Sess. 72 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4397.

EPA has construed § 401 accordingly. The agency's regulations expressly provide that states may enforce their water quality standards through § 401. *See* 40 C.F.R. § 121.2(a)(3) (1992).²¹ We do not believe that any other result is tenable, in

reference where section 301 is listed." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4471.

²⁰ Comm. on Public Works, 93d Cong., 1st Sess., *Legislative History of the Water Pollution Control Amendments of 1972*, at 176 (Comm. Print 1973).

²¹ *See* EPA, *Wetlands and 401 Certification* 23 (1989). ("In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limits, water quality standards, * * * and with 'any other appropriate requirement of State law'." (Emphasis added.)

light of the plain language of the statute and its legislative history, but even if there were statutory ambiguity, EPA's authoritative interpretation would clearly be entitled to deference. *See, e.g., Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1059 (1992); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. The propriety of limitations on flow reductions to ensure compliance with state water quality standards is no less clear under the plain terms of § 401. Section 401(d) describes in no uncertain terms the scope of conditions that may be imposed to ensure the "applicant['s]" compliance with applicable water pollution requirements. Such "conditions" are not confined to "effluent limitations," which limit the addition of pollutants to the waters, but may include "other limitations" as well. 33 U.S.C. § 1341(d). The statutory language in no manner questions the propriety of such a limitation taking the form of a limitation on flow reduction.

To be sure, § 401's plain language confines the scope of permissible "limitations," but it does so based on their purpose rather than their form. According to § 401(d), such "limitations" are confined to those

necessary to assure that any applicant * * * will comply with any applicable effluent limitations and other limitations, under section [301 or 302] of this title * * * and with any other appropriate requirement of State law set forth in such certification * * *.

33 U.S.C. § 1341(d). The minimum flow condition is a "limitation" necessary to assure the Elkhorn project's compliance with water quality standards, and is therefore within the scope of conditioning authority provided by § 401(d).

Finally, there is no merit to Petitioners' assertion (Pet. Br. 37-42) that the CWA generally bars the use of minimum instream flow requirements to promote water quality objectives. In support, Petitioners rely on §§ 101(g) and 510(2) of the Act, both of which evince congressional intent to ensure that the CWA does not serve as a basis for federal usurpation of the states' traditional authority over water rights pertaining to water quantity. See 33 U.S.C. §§ 1251(g), 1370(2).

Petitioners' claim is, to say the least, ironic. Petitioners invoke two provisions of the CWA designed to preserve state control over water rights, including the water quality impacts of the allocation of those rights, to support their claim that the State here *lacks* the power to regulate flow to protect water quality in its borders. What Petitioners ignore is that under § 401, the federal government is not attempting to use flow requirements to protect water quality. *The State is*. And, as reflected in the very provisions upon which Petitioners rely, the State's ability to do so was decidedly something that the CWA intended *not* to disturb.

Indeed, for that reason, §§ 101(g) and 510(2) actually support our view. But, in any event, the congressional determination that the federal government could not interfere with state water rights for water quality protection purposes provides absolutely no support for Petitioners' claim that Congress intended to prevent the states likewise from doing so.

3. Section 401 therefore imposes only one limitation on the use of minimum instream flow requirements under § 401. And that is the same limitation generally imposed by the section — it must be necessary to ensure compliance with applicable requirements, including water quality standards. The validity of

the State's imposition of limitations on the Elkhorn project's projected flow reductions, therefore, depends entirely on whether such limitations are necessary to ensure compliance with state water quality standards. And, about that, there can be no serious dispute in this case.

Washington's standards identify salmon and other fish migration, rearing, and spawning as characteristic uses of the Dosewallips River²² and prohibit degradation of the river "which would interfere with or become injurious to existing beneficial uses."²³ Without the minimum instream flow required by the State, the Elkhorn project will violate this requirement. As described by the court below,

[g]iven that Ecology's fisheries biologists determined that the instream flows urged by Tacoma risked such degradation, Ecology therefore could not issue the 401 certification without imposing more protective instream flow conditions.

(Pet. App. 8a.) The State's minimum instream flow condition is therefore necessary to bring the project into compliance with Washington's water quality standards, and, as such, falls squarely within the bounds of an appropriate exercise of § 401 conditioning authority.

B. The State Must Ensure Compliance With All Of Its Water Quality Standards, Not Just The Water Quality Criteria

The state water quality standard upon which the State bases its instream flow requirement is the State's antidegradation policy. This policy, as required by regulations promulgated by

²² WAC 173-201-080(32) and -045(1)(b).

²³ WAC 173-201-035(8)(a).

EPA under § 303, prevents interference with or injury to "existing uses." In this case, existing uses include use by salmon and steelhead of the Dosewallips River.

Petitioners seek to avoid this requirement of Washington's standards by inventing a distinction between different types of state water quality standards and claiming that § 401 ensures compliance with some but not others. Petitioners contend, moreover, that the state water quality standard upon which the State has based its flow reduction limitations, i.e., the antidegradation policy, falls outside § 401's scope. In particular, Petitioners argue that only the "water quality criteria" portion of Washington's water quality standards are enforceable. Washington's standards do not support this argument in any way. Washington's antidegradation standard prohibits, in no uncertain terms, degradation of state waters that interferes with or injures existing uses. This provision is every bit as enforceable as Washington's water quality criteria. Likewise, nothing in the CWA or in EPA's water quality standard regulations support Petitioners' narrow interpretation of water quality standards.

Section 303(c)(2)(a) contains what is apparently the crucial phrase of § 303 for Petitioners' argument. This phrase reads as follows:

Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.

33 U.S.C. § 1313(c)(2)(a). From this language, Petitioners argue that the criteria "provide the operative regulatory requirements and the designated uses provide water quality goals that the criteria are to protect and advance." (Pet. Br. 31-32.) This conclusion simply does not follow from the quoted

language. To the contrary, the quoted language simply states that water quality standards are to consist of designated uses *and* the water quality criteria for such waters based upon such uses.

EPA's water quality standard regulations implement § 303. 40 C.F.R. pt. 131. In 40 C.F.R. § 131.6, EPA defines the minimum requirements for state water quality standards to be submitted to EPA for review and approval. This section requires that such standards include:

(a) Use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act.

(c) Water quality criteria sufficient to protect the designated uses. [and]

(d) An antidegradation policy consistent with § 131.12.²⁴

40 C.F.R. 131.6.

Designated uses are defined at 40 C.F.R. § 131.3(f) as "those uses specified in water quality standards for each water body * * * whether or not they are being attained." Thus, designated uses may or may not actually exist in the water body. 40 C.F.R. § 131.10(a) states that designated uses are to "be achieved and protected." The water quality criteria are intended to accomplish this objective. 40 C.F.R. § 131.11(a).

Importantly, however, EPA's regulations require a higher level of protection for *existing uses*, which are defined as "those uses actually attained in the water body on or after

²⁴ Since enactment of § 401, EPA has consistently required the states to protect existing uses via an antidegradation policy. The initial water quality standard regulation promulgated after § 303 was enacted required states to adopt standards that included designated uses, water quality criteria and an antidegradation policy. 40 C.F.R. § 130.17 (1975). The antidegradation policy was initially established by the Secretary of Interior in 1968, implementing the Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965).

November 28, 1975 * * * .²⁴ 40 C.F.R. § 131.3(e). Section 131.12 defines the antidegradation policy, which expressly protects existing uses. Each state is required to adopt a policy consistent with, *inter alia*, the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, * * * that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully.

40 C.F.R. § 131.12(a)(1) and (2).

Hence, EPA's construction of § 303, as formally expressed by its water quality standard regulations, does more than just support the lower court's holding. The agency's construction requires that state water quality standards contain an antidegradation policy, which, in turn, requires the maintenance of existing water uses.

EPA's formal CWA guidance to the states similarly requires protection of existing uses. In the agency's "Introduction to Water Quality Standards," EPA carefully explains that "[t]he EPA's antidegradation policy sets minimum requirements for State antidegradation policies which conserve, maintain and protect existing uses and water quality."²⁵ EPA has also stated that "no activity is allowable under the antidegradation policy which could partially or completely

²⁵ EPA, *Introduction to Water Quality Standards* 18 (1988).

eliminate any existing use whether or not that use is designated in a state's water quality standards."²⁶ Thus, in implementing the CWA, EPA has required states to adopt antidegradation policies that prohibit water degradation that would injure or eliminate existing water uses. Because EPA is responsible for implementing the CWA, the agency's judgment is entitled to substantial deference. *Arkansas*, 112 S. Ct. at 1059;²⁷ *Chevron*, 467 U.S. 837.

It is critical to recognize that Congress has ratified the antidegradation policy developed by EPA. Section 303(a)(1) provided that any state water quality standards in effect on October 18, 1972, would remain in effect unless subsequently disapproved by EPA. At that time, all fifty states had promulgated antidegradation policies protecting existing water uses. See Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water*, 62 Iowa L. Rev. 643, 659 (1977). Moreover, in 1987 Congress specifically endorsed the antidegradation policy when it enacted § 404(b)(4)(B) of the Water Quality Act of 1987, Pub. L. 100-4, 101 Stat. 7. This section amended § 303 of the CWA, providing that "any water quality standard

²⁶ EPA, *Questions and Answers re: Antidegradation* 3 (1985).

²⁷ *Arkansas v. Oklahoma* is instructive not only with regard to the propriety of deference to EPA's interpretation of the CWA, but also with regard to the enforceability of the antidegradation standard. The primary issue in that case was the appropriateness of EPA's application of Oklahoma's antidegradation standard to a single source of water pollution located in Arkansas. The Court upheld EPA's application of the standard. 112 S. Ct. at 1059-61. Implicit in this Court's holding, and in EPA's action, was the shared understanding that Oklahoma's antidegradation standard applied to an individual discharger and water quality impacts resulting from the discharge. This application of a state's antidegradation standard conflicts with Petitioners' argument that the antidegradation standard "cannot be applied under § 401 independently of the criteria * * * (Pet. Br. 36).

established under this section or any other permitting standard may be revised only if such revision is consistent with the antidegradation policy established under this section." 33 U.S.C. § 1313(d)(4)(B).²⁸

Finally, Petitioners' attempt to limit the ability of a state to safeguard its water quality standards under § 401 is not only inconsistent with the terms of the CWA and EPA's long-standing construction of the statute, it is wholly incompatible with the statute's purpose. The simple fact is that water quality criteria oftentimes do not adequately address the water quality impacts of certain activities. The Elkhorn project is a perfect example. The project, as proposed by Petitioners, will injure or eliminate an existing use of the Dosewallips River. Yet, the project will likely not violate any of Washington's water quality criteria. The antidegradation policy is intended to prevent exactly this eventuality. The antidegradation policy is a water quality insurance policy, to be used in situations like this one, where the criteria alone will not adequately protect existing water uses.²⁹ Just like the water quality criteria, the antidegradation policy is an essential component of state water quality standards, which must be enforced through § 401.

²⁸ The Senate Report describes the antidegradation policy as "the cornerstone of the entire Clean Water Act." Senate Comm. on Environment and Public Works, 100th Cong., 2d Sess., Legislative History of the Water Quality Act of 1987 (Public Law 100-4) including Public Law 97-440; Public Law 97-117; Public Law 96-483; and Public Law 96-148, at 1422, 1426 (Comm. Print 1988).

²⁹ Petitioners' criteria argument puts form over substance. If states, as they are free to do, promulgate instream flow or aquatic resource standards as part of their water quality criteria, hydroelectric projects would be required to comply with those criteria, even under Petitioners' restrictive analysis of water quality standards. Is it permissible to regulate hydroelectric projects under instream flow or other narrative criteria and impermissible to do so under the antidegradation standard? Such a result is absurd.

In summary, Washington's water quality standards require, in clear and unambiguous terms, that existing uses be maintained. The minimum flow required by the State is necessary to maintain an existing use, and without it the Elkhorn project will violate Washington's standards. Furthermore, Washington's water quality standards and their requirement that existing uses be maintained are wholly consistent with § 303 of the CWA and EPA's implementing regulations.

II. SECTION 401 AUTHORIZES THE IMPOSITION OF CONDITIONS ON A WATER QUALITY CERTIFICATE WHEN NECESSARY FOR COMPLIANCE WITH "OTHER APPROPRIATE REQUIREMENTS OF STATE LAW"

The State's minimum flow requirement is a permissible limitation under § 401 even if, contrary to our argument above, compliance with § 303 requires only compliance with the State's water quality criteria. Section 401(d), which defines the substantive scope of § 401 certification conditions, authorizes states to impose not only conditions that are necessary to ensure compliance with water quality standards, but also those necessary to ensure compliance with "any other appropriate requirement of state law." Petitioners argue that this phrase refers only to water quality standards developed by the states pursuant to § 303 of the CWA. We contend, and the court below agreed (Pet. App. 13a), that the phrase is not limited to state water quality standards, but includes any state law requirement — statute or regulation — which is reasonably related to the water quality goals of the CWA.

Section 401(d)'s literal terms, once again, provide no support for Petitioners' claimed distinction. Quite the opposite is true. Their plain import is that the term "appropriate

requirement" is not confined to those state water quality standards already within the Act's formal embrace. Section 401(d) thus pointedly distinguishes between those requirements arising under federal law and those arising under state law. It provides, first, for limitations necessary to ensure the applicant's compliance with §§ 301, 302, 306, and 307 of the CWA, and then goes on to extend the scope of compliance to "any other appropriate requirements of state law."

To be sure, this final clause does not sanction the State's imposing any kind of state law requirement on an applicant for a federal license or permit. The requirement must be "appropriate." But, contrary to Petitioners' submission (Pet. Br. 45), "appropriate" does not confine the state law to a § 303 water quality standard. Otherwise, the clause would add nothing, because, as Petitioners elsewhere concede (Pet. Br. 44), those § 303 water quality standards are already within the scope of § 401(d) by virtue of its reference to § 301 which explicitly incorporates § 303.³⁰ It is axiomatic that congressional enactments are to be interpreted such that every word, clause and sentence of a statute is given effect. *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011 (1992); *United States v. Gooding*, 25 U.S. 460 (1827). The natural and ordinary meaning of § 401(d), therefore, is that the State can impose limitations

³⁰ See note 19, *supra*. "Section 303 is always included by reference where section 301 is listed." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), reprinted in 1977 U.S.C.C.A.N. 4424, 4471.

necessary for compliance with § 303 state water quality standards and with "any other appropriate requirements of state law."³¹

In our view, "appropriate" simply means that the requirement must, of course, relate to the activity in question and, even more fundamentally, be "reasonably related" to the purposes and policies of the CWA. *Cf. Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777 (1984) (condition imposed by Secretary of the Interior on FERC license for hydropower project within Indian reservation "must be reasonably related to the protection of the reservation and its people").³² EPA has embraced a similar view, concluding that Congress meant in § 401(d)'s reference to appropriate requirements to allow "[s]tates to condition certifications on compliance with any State or local law requirements related to water quality preservation." EPA, *Wetlands and 401 Certification* 25-26 (1989).

Applying this analysis here, it is readily apparent that RCW 90.54.030(2)(a) requiring minimum instream flows to

³¹ Petitioners' reference to the canon of statutory construction "*ejusdem generis*" to support a different result is unavailing. Here, Congress has deliberately set "any other appropriate requirement of State law" apart from "any applicable effluent limitations and other limitations" in order to ensure the provision's expansive construction. Hence, application of *ejusdem generis* is not warranted because "it may not be used to defeat the obvious purpose of legislation." *Gooch v. United States*, 297 U.S. 124, 128 (1936); see *King v. United States*, 379 U.S. 329, 336-37 (1964) ("other person"); *United States v. Alpers*, 338 U.S. 680, 683-84 (1950) ("other matter of indecent character"); see also *Cutler v. Kouns*, 110 U.S. 720, 728 (1884) ("other crimes").

³² The Washington Supreme Court below sought guidance from § 101(a) of the CWA, which describes the Act's purpose, in interpreting the "other appropriate requirements" phrase. See 33 U.S.C. § 1251(a). Upon the Act's objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, the state supreme court reasoned "[t]his broad purpose suggests that what state laws qualify as 'appropriate' for purposes of section 401(d) should also be understood broadly." (Pet. App. 11a.)

preserve, *inter alia*, fish and wildlife, is just such an "appropriate" state law under § 401(d). This state statutory provision is closely related to the State's antidegradation policy, and is certainly "reasonably related" to the purposes and policies of the CWA. *Escondido*, 466 U.S. 765. This being the case, the State was fully authorized to impose conditions in the Elkhorn project's § 401 certificate to ensure the project's compliance with this "appropriate" state law.

III. THE ELKHORN PROJECT WILL CAUSE A NUMBER OF DISCHARGES WHICH WILL CAUSE WATER POLLUTION AND, IN THE ABSENCE OF THE MINIMUM INSTREAM FLOW REQUIRED BY THE STATE, THESE DISCHARGES WILL VIOLATE STATE WATER QUALITY STANDARDS

After seven years of litigation, Petitioners now, for the first time, contend that the minimum flow requirement is invalid because it does not address a "discharge" from the Elkhorn project.³³ This contention is fundamentally flawed because it rests on an unduly narrow view of the term "discharge," within the meaning of § 401. Contrary to Petitioners' argument that states are limited to discharges "which add something" to the water, Congress used the term "discharge" broadly in § 401, thereby authorizing states to conduct a full examination of all of a project's discharges and their water quality impacts.

³³ It is axiomatic that issues not raised at trial cannot, absent special circumstances, be raised on appeal. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court. [Citations omitted.] . . . [The rule's] usual formation is: 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.' [Citing *Duignan v. United States*, 274 U.S. 195, 200 (1927).] *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Petitioners did not raise the discharge issue prior to their Petition for Writ of Certiorari.

A. A Section 401 "Discharge" Includes Any Discharge That Will Cause Water Pollution

Section 401(a)(1) provides that activities that "may result in any discharge" must be certified and that the state must determine that "any such discharge will comply with," *inter alia*, water quality standards. Section 502(16) defines the term "discharge" as follows: "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16).³⁴ Thus, the term "discharge" *includes* discharges of pollutants but it is not limited thereto,³⁵ and because § 401 uses the term without qualification, "discharge" in § 401 is not limited to discharges of pollutants. Petitioners do not contend otherwise.

What discharges then are covered by § 401? Given how "discharge" is used in § 401, Congress' intent in enacting the provision, and EPA's construction of it, it is appropriate to construe the term broadly to include any discharge that causes water "pollution."³⁶ This interpretation makes sense and, in marked contrast to Petitioners' suggested interpretation, fully effectuates § 401 and allows achievement of the CWA's objective to restore and maintain the chemical, physical and biological integrity of the nation's waters.

³⁴ The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."

³⁵ All of the other definitions in § 502 of the CWA use the prescriptive term "means." See 33 U.S.C. § 1362(1)-(15), (17)-(20). It is significant that the definition of discharge does not use this prescriptive term, but rather, uses the non-limiting term "includes." The use of this term plainly indicates congressional intent not to limit the term "discharge" to "discharges of pollutants."

³⁶ Section 502(19) defines "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19).

1. The terms of § 401 authorize states to examine fully all discharges from any federally licensed activities. Section 401's unqualified usage of "discharge" is the clearest evidence of this fact. Indeed, Congress uses "activity" and "discharge" interchangeably in § 401. In the sentence immediately following the clause upon which Petitioners place so much reliance, Congress uses the alternative "activity" phrasing to refer to the scope of certification authority. That subsequent sentence provides that "[i]n the case of any such *activity* for which there is not an applicable effluent limitation or other limitation [under the CWA], * * * the State shall so certify." See 33 U.S.C. § 1341(a)(1). (Emphasis added.)³⁷ In short, the manner in which "discharge" is used in § 401 does not support Petitioners' narrow view of state § 401 authority. To the contrary, it indicates congressional intent that states examine all of a facility's discharges and the water quality impacts resulting from those discharges.

2. The statute's legislative history also strongly suggests that the states are to perform a broad review of all discharges causing pollution resulting from a proposed activity. Section 401 finds its genesis in § 21(b) of the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970), which immediately preceded congressional enactment of § 401 as part of the comprehensive Federal Water Pollution Control Act

³⁷ To similar effect is § 401(a)(4). While that section is not at issue here, it too shows that Congress used "activity" and "discharge" interchangeably in § 401. It focuses on whether "the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements." 33 U.S.C. § 1341(a)(4). See also § 401(a)(3) (authorizing state review of "construction or operation of a facility") and § 401(a)(5) (authorizing revocation of federal license where "facility or activity" violates, *inter alia*, water quality standards.)

Amendments of 1972 (FWPCA), Pub. L. No. 92-500, 86 Stat. 816 (1972). Using language virtually identical to that currently found in § 401, § 21(b) required state certification for every federally licensed or permitted activity "which may result in any discharge into the navigable waters." Section 21(b) further authorized states to certify "that such *activity* will not violate applicable water quality standards." *Id.* (Emphasis added.)

In enacting § 401, Congress changed the wording of this clause by replacing "activity" with "discharge." The accompanying legislative history, however, reveals that Congress, unlike Petitioners, did not view this as a major substantive change. Legislative reports repeatedly characterized § 401 as being substantially the same as § 21(b), with the former reflecting only "minor" changes necessary to take account of the fact that the FWPCA superimposed an effluent limitation regulatory scheme on top of the pre-existing state water quality standards program. See S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971); H.R. Rep. No. 911, 92d Cong., 2d Sess. 121-24, 165 (1972), *reprinted in* Comm. on Public Works, 93d Cong. 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, at 753, 808-11, 852 (Comm. Print 1973). It is not surprising therefore that when Congress subsequently amended § 401 in 1977, the Conference Report described the section as providing for state certification that "a federally licensed or permitted *activity* * * * [will] comply with State water quality standards." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4471. (Emphasis added.)

3. Finally, EPA has long adopted the broader construction of a state's § 401 certification authority. According

to the agency's regulation implementing § 401, the state must certify that the federally licensed "activity will be conducted in a manner which will not violate water quality standards." 40 C.F.R. § 121.2(a)(3). (Emphasis added.) EPA's formal guidance provides:

[A]ll of the potential effects of a proposed activity on water quality — direct and indirect, short and long term, upstream and down-stream, construction and operation — should be part of a State's certification review.

See EPA, *Wetlands and 401 Certification* 23 (April, 1989). (Emphasis omitted.) Because EPA is the agency responsible for the CWA's implementation, EPA's long-standing and formal construction of § 401 in the face of any statutory ambiguity is entitled to judicial deference. See *Chevron*, 467 U.S. 837.

Thus, all of the usual tools of statutory construction indicate that Congress intended that under § 401 states perform a thorough examination of all of an activity's discharges and the water pollution caused by these discharges. In this way, Congress authorized states to examine all of the water quality impacts of federally licensed activities, and to ensure that such activities will comply with state water quality requirements.

B. The Elkhorn Project Will Cause A Number Of "Discharges" Causing Water Pollution.

The Elkhorn project will cause at least three kinds of "discharges" covered by § 401. These are (1) discharges of dredged and fill material, (2) discharges of pollutants, and (3) discharges of non-point source pollution.³⁸

³⁸ The term "non-point source" is not defined in the CWA, but refers to sources or causes of pollution emanating from other than point sources. Section 304(f), which authorizes EPA to issue non-point source pollution guidelines, identifies a number of non-point sources of pollution, including

1. Obviously, the Elkhorn project will cause a discharge of dredged and fill material. Such discharges are regulated directly by the Army Corps of Engineers (Corps) under § 404 of the CWA. 33 U.S.C. § 1344. The Corps has defined the term "discharge of fill material" to include the "building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; * * * [and] dams and dikes."³⁹ Thus, the Corps has defined dams themselves as "discharges" subject to the CWA.

In this case, then, the first, and most fundamental, discharge is the Elkhorn dam itself. It is this "discharge" that will violate water quality standards, necessitating the imposition of the minimum flow requirement. Petitioners, however, consider only the discharges resulting from construction and operation of the hydroelectric facility, and do not address the fact that the facility is itself a discharge into navigable waters. Unlike most activities that discharge into navigable waters, hydroelectric facilities are located (at least in part) in the waters themselves. Applying Petitioners' own definition of "discharge," the hydroelectric facility is itself "an addition of something to the receiving waters." (Pet. Br. 23.) (Emphasis in original.) It certainly cannot be gainsaid that hydroelectric facilities constitute a massive addition of material into the waters. That those structures serve a purpose and also

"changes in the movement, flow, or circulation of any navigable waters, * * * including changes caused by the construction of dams, * * * or flow diversion facilities." 33 U.S.C. § 1314(f)(F). See also EPA, *Non-Point Source Guidance*, App. B (Dec. 1987) (listing "Hydrological/Habitat Modification" through "dam construction" as sources of non-point pollution).

³⁹ 33 C.F.R. § 323.2(f) (1993) (emphasis added); 40 C.F.R. § 232.2(f) (1992).

further discharge into the waters in no way changes their initial status as a discharge.⁴⁰

There is also nothing in the CWA to support Petitioners' apparent assumption that the Act is not concerned with the adverse water quality effects that such a discharge can have by reducing flow. The CWA broadly defines water "pollution" to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19). As described by the court below, quoting an EPA official, "protection of water quality involves more than just addressing water chemistry. Rather, protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life."⁴¹

One obvious way that discharges of fill material can affect the "biological integrity" of water, and thus constitute water pollution, is by obstructing flow. Certainly dumping massive amounts of materials into navigable waters can have just that result and, for that reason, be subject to regulation. Indeed, that is the primary focus of the CWA's § 404 permitting program that, as described by Petitioners themselves (Pet. Br. 24-25), requires "permits for the discharge of dredged or fill

⁴⁰ Petitioners are, for this reason, mistaken in claiming (Pet. Br. 29-30) that the State must certify Petitioners' project without condition because the discharges from that project will not add any pollutants not already present in the waters. Even assuming the validity of their assertion that their facility's discharges, like those at issue in *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) and *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), will not add anything to the water, that does not undermine the status of the facility itself as a discharge (of fill material). This discharge will cause pollution, thereby triggering § 401 certification authority under § 401(a).

⁴¹ Pet. App. 8a, quoting Resp. App. 90a (Letter from LaJuana Wilcher, Assistant Administrator of EPA to The Honorable Lois D. Cashell, Secretary of FERC).

material at specified disposal sites, whether or not from a 'point source.'" 40 C.F.R. § 232.2(f). Nor is there any statutory exemption based on the fact that the purpose of the discharge is in fact to obstruct and divert waters. Any discharge that obstructs and diverts waters, like other kinds of discharges, necessarily falls within the scope of the CWA and is subject to the Act's requirements, including § 401 and state water quality standards.

For this reason, it was entirely appropriate for the State in this case to exercise its § 401 authority to address the extent to which the Elkhorn project "discharge" will itself obstruct navigable waters. It was likewise appropriate for the State to address the adverse effects of this discharge in the most direct manner possible, which is by imposing a "limitation" that addresses instream flow levels. The State's action in this case is therefore entirely consistent with the language of § 401, including § 401(a)'s use of the word "discharge."

2. In addition to the Elkhorn project itself constituting a discharge, construction and operation of the project will cause a number of additional discharges of pollutants and pollution. Construction of the project will cause discharges of pollutants (dredge spoils, concrete) and non-point source pollution (soil erosion). (PCHB Ex. A-4, pp. E2-12 - E2-17.) Petitioners concede that these are discharges subject to § 401. (Pet. Br. 27-29.) During operation, river water will be diverted out of the channel, through the penstock and powerhouse, and then back to the channel through the tailrace. Petitioners again concede that this discharge is a discharge subject to § 401. (Pet. Br. 27-29.) These discharges alone trigger application of § 401 which allows

state review of all of the water pollution caused by the project's discharges.

3. Finally, operation of the dam will cause a discharge of pollution. At the dam itself, water from behind the dam will be discharged by sluice gate or through the fish ladder to the river channel below. This water will be significantly different than the water above the dam. Some minor physical and chemical changes, such as turbidity levels, dissolved gas concentrations, nutrient levels, and temperature increases are likely. (PCHB Ex. E2-17 - E2-22.) The major alteration, however, will be the flow reduction. All of these changes are man-induced alterations of the water's chemical, physical and biological integrity, and thus constitute pollution under the CWA. Therefore, operation of the dam itself will cause a discharge of pollution, which is directly addressed by the minimum instream flow requirement.⁴²

IV. FERC'S LICENSING AUTHORITY UNDER THE FEDERAL POWER ACT DOES NOT AFFECT OR AMEND STATE AUTHORITY UNDER SECTION 401 TO ENSURE COMPLIANCE WITH STATE WATER QUALITY STANDARDS

Petitioners would have this Court construe § 401 in light of the FPA and, more particularly, in a manner that Petitioners claim would reconcile the two laws. (See Pet. Br. 46-49.) Petitioners, however, fail to consider that § 401 applies to all

⁴² See *National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1484 (D.C. Cir. 1990) (affirming FERC's determination that where dam will cause soil erosion upstream of the dam, the dam's discharge nevertheless occurs at the dam, stating "Common sense supports FERC's conclusion that the discharge in this case would occur at the dam, where the flow of water would be blocked * * *.") See also *National Wildlife Fed'n v. Consumers Power*, 862 F.2d at 588 ("[g]enerally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the 'nonpoint source' category of pollution.")

federally licensed or permitted activities which may result in discharges into navigable waters. It does not apply just to FERC and hydroelectric facilities. For that reason, whether § 401 applies to the adverse water quality impacts of flow reduction and therefore authorizes the imposition of minimum instream flow requirements does not depend on the scope of FERC's authority under the FPA. In the absence of any explicit statutory exceptions, the answer under § 401 should be the same for all federally licensed or permitted activities.

1. There is, moreover, no such exception for FERC in § 401. FERC, like any other federal agency permitting an activity subject to § 401, must include any state-imposed conditions in its license. Section 401(d) provides, without exception, that any limitations set forth in the state certification "shall become a condition on any Federal license or permit * * *." FERC has accordingly ruled that it possesses no authority to review § 401 limitations. See *Town of Summersville*, 60 F.E.R.C. ¶ 61,291, at 61,990 (1992), *reh'g denied*, 63 F.E.R.C. ¶ 61,037 (1993). Under federal law, FERC must include them in its license. Congress has left no room for "harmonizing" efforts that exempt FERC from the scope of state authority otherwise applicable to federally licensed or permitted activities under § 401.

2. This Court's recent decision in *California v. FERC*, 495 U.S. 490 (1990) does not suggest otherwise. Petitioners cite repeatedly to that case, but it has little, if any, bearing on this case. In *California v. FERC*, this Court held that the FPA preempted the State of California from imposing minimum instream flow requirements on a FERC-licensed hydroelectric project that were more stringent than those FERC had included

in the license. *Id.* at 505-07. Unlike in this case, § 401 was not at issue and FERC had already issued its license, which California sought, in effect, to unilaterally amend pursuant to state law.

By contrast, in this case, FERC has not issued a license and the State claims its right to impose a minimum instream flow requirement on the applicant for a FERC license as a matter of federal law. The State readily acknowledges that its authority is derived from, and limited by, the terms of a federal statutory provision — § 401 of the CWA. The State does not claim that it can impose minimum instream flow requirements whenever it wishes on a FERC-licensed hydroelectric project. Nor does the State assert that it can impose minimum instream flow requirements to serve any otherwise legitimate governmental end. The State agrees that it can impose such requirements only pursuant to the procedural rules and substantive boundaries provided by Congress in § 401.

3. By its express terms, § 401 eliminates any possible preemption claim. As a matter of federal law, the state conditions become part of the federal license, including licenses issued by FERC, and therefore are, for obvious reasons, not subject to preemption. Because § 401(d) specifically provides that those limitations "shall become a condition on any Federal license or permit" (33 U.S.C. § 1341(d)), the limitations cannot, by definition, conflict with a FERC license; they are themselves part of the license.

Indeed, this result is entirely consonant with this Court's reasoning in *California v. FERC*. The Court emphasized in its decision in that case that courts "must * * * give full effect to evidence that Congress considered and sought to preserve the

states' coordinate regulatory role in our federal scheme." In ruling against the state in *California v. FERC*, the Court simply deferred to its prior ruling in *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946), that there was no such "evidence" in the FPA. Section 401 of the CWA, however, provides just such evidence of congressional consideration and that legislative judgment must, accordingly, be given "full effect."

4. Petitioners are similarly wrong in suggesting (Pet. Br. 46) that reading § 401 according to its plain terms would "subvert the [FPA]'s comprehensive licensing scheme." Their argument rests, at bottom, on a false image of the exclusivity of FERC's authority under that Act. FERC's authority is extensive, but not to the exclusion of the states and other federal agencies over many aspects of the construction, operation, and maintenance of hydroelectric facilities.

Indeed, § 401 establishes just that. By Petitioners' own admission, a state can exercise its § 401 authority over many aspects of a hydroelectric project seeking a FERC license based on its impact on water quality. Petitioners' only contention is that the State's jurisdiction does not extend to the adverse effects of flow reduction.

It is likewise clear that a hydroelectric project is subject to regulation under § 404 of the CWA, 33 U.S.C. § 1344. Under that provision, the Army Corps of Engineers may decide, based on its own weighing of many of the same environmental factors already considered by FERC pursuant to the FPA, that a FERC-approved hydropower project should be barred. See *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 816 (1987). The EPA, moreover, can independently veto the issuance of such a permit even if both

FERC and the Army Corps support its issuance. See § 404(c), 33 U.S.C. § 1344(c). And, because Congress specifically authorized EPA to allow administration of the § 404 permitting program by state agencies (see 33 U.S.C. § 1344(g) and (h)), a state, too, can exercise veto authority over a hydroelectric facility based on the state's independent assessment of water quality impacts already considered by FERC under the FPA.⁴³

Finally, this Court recently upheld the rights of another federal agency to impose conditions on FERC licenses over FERC's objection. In *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984), the Court upheld the authority of the Secretary of the Interior to impose conditions on a FERC license issued to projects located within a federal Indian reservation. Because the wording and the purpose of the statutory provision at issue in *Escondido* is akin to § 401, *Escondido*, not *California v. FERC*, is this Court's precedent most relevant to the case now before the Court.

At issue in *Escondido* was the meaning of § 4(e) of the FPA, 16 U.S.C. § 797(e), which authorizes FERC to issue licenses for the construction, operation, and maintenance of hydroelectric project works located on the public lands and reservations of the United States. Section 4(e) provides that licenses issued under that section "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the

⁴³ See *Monongahela Power Co. v. Marsh*, 809 F.2d at 53. ("Given the two statutory sections and their legislative histories, congressional intent would be betrayed by implication of an exemption of FPC-licensed hydroelectric projects from the explicit requirements of [§ 404 of the CWA]. We do not view this as a 'repeal' of FPC authority but as a reconciliation seen by Congress as necessary to ensure the protection of a vital national interest.")

adequate protection and utilization of such reservation." 16 U.S.C. § 797(e).⁴⁴ FERC argued, notwithstanding the plain meaning of the statutory language, that it could reject any of the Secretary's conditions with which it disagreed. This Court disagreed with FERC.

Like Petitioners in this case, the petitioners in *Escondido* contended that the plain meaning of the statutory language should not be followed because "Congress could not have intended to empower the Secretary to require that conditions be included in the license over the objection of the Commission because that would frustrate the purpose of centralizing licensing procedures." 466 U.S. at 773. This Court was not persuaded. The Court responded that "while Congress intended that the Commission would have exclusive authority to issue all licenses, it wanted the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdictions." *Id.* at 775. In short, "Congress meant what it said" in § 4(e). *Id.*

Identical reasoning applies here. In enacting § 401(d), Congress simply wanted to allow those responsible for water pollution control "to play the major role in determining what

⁴⁴ Section 501(a) of the Federal Land and Policy Management Act also provides the Forest Service and Bureau of Land Management, not FERC, with the authority to decide whether to convey any right of way over public lands within their respective jurisdictions needed by a FERC licensee. See 43 U.S.C. § 1761(a)(4) (1988). In *California v. FERC*, 966 F.2d 1541 (9th Cir. 1992) (not related to the *California v. FERC* case discussed above), the Ninth Circuit severely limited the BLM's right to require rights of way for FERC-licensed hydroelectric projects. Congress immediately responded, clarifying and reaffirming the BLM's right to require rights of way for FERC licensees. Comprehensive Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XXIV, § 2401, 106 Stat. 3096-97 (amending section 501 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1761)).

conditions would be included in the license." 466 U.S. at 775. In many aspects of the CWA, the decisionmaker is a federal agency — either EPA or the Army Corps of Engineers. But, under § 401, Congress determined that the appropriate decisionmaker should be the states themselves. And, just like in § 4(e) of the FPA, Congress in § 401(d) of the CWA provided that those state limitations on certification "shall become a condition on any Federal license or permit." In short, "Congress meant what it said" in § 401(d), just like it did in § 4(e), and that congressional judgment is dispositive.

4. Finally, Petitioners' reliance (Pet. Br. 46, 48-49) on the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, 100 Stat. 1243, is entirely misdirected. Petitioners are hard pressed to claim that this Court should interpret the meaning of § 401 of the CWA, which Congress passed in 1972 and amended in 1977, based on the meaning of a wholly different law that a different Congress passed nine years later in 1986. But Petitioners (bravely) press on, notwithstanding their failure to proffer any evidence in either ECPA's statutory language or legislative history to suggest the slightest hint of congressional intent to address the CWA issue.

Congress enacted ECPA based on FERC's "less than satisfactory" past performance in considering environmental factors in its licensing determinations. H.R. Rep. 507, 99th Cong., 2d Sess. 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2496, 2504. ECPA accordingly required FERC to provide "equal consideration" to non-power values such as energy conservation, fish and wildlife protection, recreational opportunities, and the "preservation of other aspects of environmental quality" in deciding whether and under what

conditions to license a hydroelectric facility. 16 U.S.C. § 797(e). ECPA also added § 10(j) to the FPA, which requires FERC to "adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat * * *." 16 U.S.C. § 803(j)(1). Section 10(j) further requires FERC to impose conditions on licenses to serve those environmental ends, based on recommendations received from state and federal fish and wildlife agencies. 16 U.S.C. § 803(j)(1). And ECPA allows FERC to decline to impose those recommended conditions only if it makes specific findings under the FPA of their inconsistency with that Act. 16 U.S.C. § 803(j)(2).

ECPA, therefore, was designed to *limit* FERC's ability to discount environmental factors in its decisionmaking. Such a congressional purpose would seem an unlikely source of congressional intent to repeal § 401 of the CWA. Indeed, Petitioners' own brief explains why.

As Petitioners themselves acknowledge, albeit in a different context, "repeals by implication are disfavored. To the maximum extent possible, courts must read related statutes together in order to give effect to each; only when the sense and purpose of each cannot be preserved by such a reading is implied repeal recognized." (Pet. Br. 47, citing *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (citing *Morton v. Mancari*, 417 U.S. 535, 549 (1974).) No such irreconcilable conflict is presented between § 401 and ECPA. The plain meaning of each is that both the states, through § 401, and FERC, through ECPA, may consider the impact on water quality of flow reductions. A state can impose limitations through § 401 on instream flow reduction, but only to the extent permitted by § 401. While FERC cannot

provide less environmental protection, FERC can decide to provide more because its environmental protection authority is not as narrowly defined. Because, moreover, the state's limitation would necessarily be expressed as a "minimum," there would be no conflict presented between that state-imposed limitation and a higher "minimum" imposed by FERC itself pursuant to ECPA.

Finally, ECPA's legislative history removes any possible doubt regarding the invalidity of Petitioners' claim. The legislative history confirms what should already be obvious from the statutory language: ECPA in no way affects the terms of the CWA, including § 401. The House Report accompanying ECPA states in no uncertain terms that "the bill does not amend or change the Fish and Wildlife Coordination Act, NEPA, *or other environmental laws.*" H.R. Rep. No. 507, 99th Cong., 2d Sess. 21 (1986) (emphasis added).

CONCLUSION

For the foregoing reasons, the judgment of the Washington State Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Chapter 173-201 WAC
WATER QUALITY STANDARDS FOR WATERS OF
THE STATE OF WASHINGTON

WAC

| | |
|-------------|---|
| 173-201-010 | Introduction. |
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DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS
CHAPTER

| | |
|-------------|---|
| 173-201-020 | Water use and quality criteria. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-020, filed 1/17/78; Order 73-4, § 173-201-020, filed 7/6/73.] Repealed by 82-12-078 (Order DE 82-12), filed 6/2/82. Statutory Authority: RCW 90.48.035. |
| 173-201-030 | Water use and quality criteria—General water use and criteria classes. [Order 73-4, § 173-201-030, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035. |
| 173-201-040 | Water use and quality criteria—General considerations. [Order 73-4, § 173-201-040, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035. |
| 173-201-050 | Characteristic uses to be protected. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-050, filed 1/17/78; Order 73-4, § 173-201-050, filed 7/6/73.] Repealed by 82-12-078 (Order DE 82-12), filed 6/2/82. Statutory Authority: RCW 90.48.035. |
| 173-201-060 | Water course classification. [Order 73-4, § 173-201-060, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035. |
| 173-201-130 | Definitions. [Order 73-4, § 173-201-130, filed 7/6/73.] Repealed by 78-02-043 (Order DE 77-32), filed 1/17/78. Statutory Authority: RCW 90.48.035. |
| 173-201-140 | Miscellaneous. [Statutory Authority: RCW 90.48.035. 78-02-043 (Order DE 77-32), § 173-201-140, filed 1/17/78; Order 73-4, § 173-201-140, filed 7/6/73.] Repealed by 82-12-078 (Order DE 82-12), filed 6/2/82. Statutory Authority: RCW 90.48.035. |

WAC 173-201-010 Introduction. (1) The purpose of this chapter is to establish water quality standards for surface waters of the state of Washington pursuant to the provisions of chapter 90.48 RCW and the policies and purposes thereof.

(2) This chapter shall be reviewed periodically by the department and appropriate revisions shall be undertaken.

(3) The water use and quality criteria set forth in WAC 173-201-035 through 173-201-085 are established in conformance with present and potential water uses of the surface waters of the state of Washington and in consideration of the natural water quality potential and limitations of the same. These shall be the sole criteria for said waters.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-010, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-010, filed 1/17/78; Order 73-4, § 173-201-010, filed 7/6/73.]

WAC 173-201-025 Definitions. (1) Background conditions: The biological, chemical, and physical conditions of a water body, upstream from the point or non-point source of any discharge under consideration. Background sampling location in an enforcement action would be upstream from the point of discharge, but not upstream from other inflows. If several discharges to any water body exist, and enforcement action is being taken for possible violations to the standards, background sampling would be undertaken immediately upstream from each discharge.

(2) Department: State of Washington department of ecology.

(3) Director: Director of the state of Washington department of ecology.

(4) Fecal coliform: That portion of the coliform group which is present in the intestinal tracts and feces of warm-blooded animals as detected by the product of acid or gas from lactose in a suitable culture medium within 24 hours at 44.5 plus or minus 0.2 degrees Celsius.

(5) Geometric mean: The nth root of a product of n factors.

(6) Mean detention time: The time obtained by dividing a reservoir's mean annual minimum total storage by the 30-day ten-year low-flow from the reservoir.

(7) Permit: A document issued pursuant to RCW 90.48.160 et seq. or 90.48.260 or both, specifying the waste

treatment and control requirements and waste discharge conditions.

(8) pH: The negative logarithm of the hydrogen ion concentration.

(9) Primary contact recreation: Activities where a person would have direct contact with water to the point of complete submergence, including but not limited to skin diving, swimming and water skiing.

(10) Secondary contact recreation: Activities where a person's water contact would be limited (wading or fishing) to the extent that bacterial infections of eyes, ears, respiratory or digestive systems or urogenital areas would normally be avoided.

(11) Surface waters of the state: Include lakes, rivers, ponds, streams, inland waters, saltwaters, and all other surface waters and water courses within the jurisdiction of the state of Washington.

(12) Temperature: Water temperature expressed in degrees Celsius (°C).

(13) Turbidity: The clarity of water expressed as nephelometric turbidity units (NTU) and measured with a calibrated turbidimeter.

(14) Upwelling: The annual natural phenomenon where the summer prevailing, northerly winds parallel to Washington's coast produce a seaward transport of surface waters. Cold, deeper more saline waters rich in nutrients and low in dissolved oxygen rise to replace the surface water. The cold, oxygen deficient water flows into Puget Sound and other coastal estuaries replacing the deep water with lower dissolved oxygen concentrations reaching the surface during late summer and fall.

(15) USEPA: United States Environmental Protection Agency.

(16) Wildlife habitat: Waters of the state used by fish, other aquatic life and wildlife for any life history stage or activity.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-025, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-025, filed 1/17/78.]

WAC 173-201-035 General considerations. The following general guidelines shall apply to the water quality criteria and classifications set forth in WAC 173-201-045 through 173-201-085 hereof:

(1) At the boundary between waters of different classifications, the water quality criteria for the higher classification shall prevail.

(2) In brackish waters of estuaries, where the fresh and marine water quality criteria differ within the same classification, the criteria shall be interpolated on the basis of salinity; except that the marine water quality criteria shall apply for dissolved oxygen when the salinity is one part per thousand or greater and for fecal coliform organisms when the salinity is ten parts per thousand or greater.

(3) The water quality criteria herein established shall not apply within an authorized dilution zone adjacent to or surrounding a waste-water discharge.

(4) Generally, waste discharge permits, whether issued pursuant to the National Pollutant Discharge Elimination System or otherwise, shall be conditioned in such manner as to authorize discharges which meet the water quality standards.

(a) However, persons discharging wastes in compliance with the terms and conditions of permits shall not be subject to civil and criminal penalties on the basis that discharge violates water quality standards.

(b) Permits shall be subject to modification by the department whenever it appears to the department the discharge violates water quality standards. Modification of permits, as provided herein, shall be subject to review in the same manner as originally issued permits.

(5) Nonpoint sources and water quality standards.

(a) It is recognized that many activities not subject to a waste discharge permit system are now being performed in the state, which result in conflicts with the water quality standards of this chapter. Further, the department has not developed a program which, in a reasonable or fully satisfactory manner, provides methods or means for meeting such standards. Persons conducting such activities shall not be subject to civil or criminal sanctions for violation of water quality standards if the activities are either:

(i) Conducted in accordance with management practices set forth by rules of the department.

For example, promulgation of regulations by the department which set forth approved management practices or other effluent limits shall be accomplished so that activities conducted within such regulations, (i.e., forest practices rules and regulations chapter 173-202 WAC and Title 222 WAC) will achieve compliance with water pollution control laws. When the regulations are violated, the water quality standard can be enforced as

described in WAC 173-201-045 through 173-201-085; or,

(ii) Subject to a regulatory order issued by the department relating to specific activities as provided for in WAC 173-201-100(2).

(b) Management practices or regulatory orders described in WAC 173-201-035(5) hereof, shall be subject to modification by the department whenever it appears to the department that the discharge violates water quality standards. Modification of management practices or regulatory orders, as provided herein, shall be subject to review in the same manner as the originally issued management practices or regulatory orders.

(6) The water quality criteria herein established for total dissolved gas shall not apply when the stream flow exceeds the 7-day, 10-year frequency flood.

(7) The total area and/or volume of a receiving water assigned to a dilution zone shall be as described in a valid discharge permit as needed and be limited to that which will:

(a) Not cause acute mortalities of sport, food, or commercial fish and shellfish species of established biological communities within populations or important species to a degree which damages the ecosystem.

(b) Not diminish aesthetic values or other beneficial uses disproportionately.

(8) The antidegradation policy of the state of Washington, as generally guided by chapter 90.48 RCW, Water Pollution Control Act, and chapter 90.54 RCW, Water Resources Act of 1971, is stated as follows:

(a) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.

(b) No degradation will be allowed of waters lying in national parks, national recreation areas, national wildlife refuges, national scenic rivers, and other areas of national ecological importance.

(c) Whenever waters are of a higher quality than the criteria assigned for said waters, the existing water quality shall be protected and waste and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except, in those instances where:

(i) It is clear that overriding considerations of the public interest will be served, and

(ii) All wastes and other materials and substances proposed for discharge into the said waters shall be provided with all known, available, and reasonable methods of treatment before discharge.

(d) Whenever the natural conditions of said waters are of a lower quality than the criteria assigned, the natural conditions shall constitute the water quality criteria.

(e) The criteria and special conditions established in WAC 173-201-045 through 173-201-085 may be modified for a specific water body on a short-term basis when necessary to accommodate essential activities, respond to emergencies, or to otherwise protect the public interest. Such modification shall be issued in writing by the director or his designee subject to such terms and conditions as he may prescribe. The aquatic application of herbicides which result in water use restrictions shall be considered an activity for which a short-term modification generally may be issued subject to the following conditions:

(i) A request for a short-term modification shall be made to the department on forms supplied by the department. Such request generally shall be made at least thirty days prior to herbicide application.

(ii) Such herbicide application shall be in accordance with state of Washington department of agriculture regulations.

(iii) Such herbicide application shall be in accordance with label provisions promulgated by USEPA under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended. (7 U.S.C. 136, et seq.)

(iv) Notice, including identification of the herbicide, applicator, location where the herbicide will be applied, proposed timing and method of application, and water use restrictions shall be given according to the following requirements:

(A) Appropriate public notice as determined and prescribed by the director or his designee shall be given of any water use restrictions specified in USEPA label provisions.

(B) The appropriate regional offices of the departments of fisheries and game shall be notified twenty-four hours prior to herbicide application.

(C) In the event of any fish kills, the departments of ecology, fisheries, and game shall be notified immediately.

(v) The herbicide application shall be made at times so as to:

(A) Minimize public water use restrictions during weekends.

(B) Completely avoid public water use restrictions during the opening week of fishing season, Memorial Day weekend, July 4 weekend, and Labor Day weekend.

(vi) Any additional conditions as may be prescribed by the director or his designee.

(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term and irreparable harm to the environment.

(g) No waste discharge permit will be issued which violates established water quality criteria, except, as provided for under WAC 173-201-035 (8)(e).

(9) Due consideration will be given to the precision and accuracy of the sampling and analytical methods used as well as existing conditions at the time, in the application of the criteria.

(10) The analytical testing methods for these criteria shall be in accordance with the most recent editions of "Standard Methods for the Examination of Water and Wastewater," published by the American Public Health Association, American Water Works Association, and the Water Pollution Control Federation, and "Methods for Chemical Analysis of Water and Wastes," published by USEPA, and other or superseding methods published and/or approved by the department following consultation with adjacent states and concurrence of the USEPA.

(11) Deleterious concentrations of radioactive materials for all classes shall be as determined by the lowest practicable concentration attainable and in no case shall exceed:

(a) 1/100 of the values listed in WAC 402-24-220 (Column 2, Table II, Appendix A, rules and regulations for radiation protection); or,

(b) USEPA Drinking Water Regulations for radionuclides, as published in the Federal Register of July 9, 1976, or subsequent revisions thereto.

(12) Deleterious concentrations of toxic, or other non-radioactive materials, shall be determined by the department in consideration of the Quality Criteria for Water, published by USEPA 1976, and as revised, as the authoritative source for criteria and/or other relevant information, if justified.

(13) Nothing in this chapter shall be interpreted to be applicable to those aspects of governmental regulation of radioactive wastes which have been preempted from state regulation by the Atomic Energy Act of 1954, as amended, as interpreted by the United States Supreme Court in the cases of *Northern States Power Co. v. Minnesota* 405 U.S. 1035 (1972) and *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976).

(14) Nothing in this chapter shall be interpreted to prohibit the establishment of effluent limitations for the control of the thermal component of any discharge in accordance with Section 316 of the Federal Clean Water Act (P.L. 95-217 as amended).

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-035, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-035, filed 1/17/78.]

WAC 173-201-045 General water use and criteria classes. The following criteria shall apply to the various classes of surface waters in the state of Washington:

(1) **Class AA (extraordinary).**

(a) General characteristic. Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (domestic, industrial, agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, spawning, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam, oyster, and mussel rearing, spawning, and harvesting.

Crustaceans and other shellfish (crabs, shrimp, crayfish, scallops, etc.) rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria.

(i) Fecal coliform organisms.

(A) Freshwater – fecal coliform organisms shall not exceed a geometric mean value of 50 organisms/100 mL, with not more than 10 percent of samples exceeding 100 organisms/100 mL.

(B) Marine water – fecal coliform organisms shall not exceed a geometric mean value of 14 organisms/100 mL, with not more than 10 percent of samples exceeding 43 organisms/100 mL.

(ii) Dissolved oxygen.

(A) Freshwater – dissolved oxygen shall exceed 9.5 mg/L.

(B) Marine water – dissolved oxygen shall exceed 7.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 7.0 mg/L, natural dissolved oxygen levels can be degraded by up to 0.2 mg/L by man-caused activities.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature shall not exceed 16.0°C (freshwater) or 13.0°C (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t = 23/(T+5)$ (freshwater) or $t = 8/(T-4)$ (marine water).

When natural conditions exceed 16.0°C (freshwater) and 13.0°C (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8°C, and the maximum water temperature shall not exceed 16.3°C (freshwater).

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) or 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.2 units.

(vi) Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste.

(2) **Class A (excellent).**

(a) General characteristic. Water quality of this class

shall meet or exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (domestic, industrial, agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, spawning, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam, oyster, and mussel rearing, spawning, and harvesting.

Crustaceans and other shellfish (crabs, shrimp, crayfish, scallops, etc.) rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria.

(i) Fecal coliform organisms.

(A) Freshwater – fecal coliform organisms shall not exceed a geometric mean value of 100 organisms/100 mL, with not more than 10 percent of samples exceeding 200 organisms/100 mL.

(B) Marine water – fecal coliform organisms shall not exceed a geometric mean value of 14 organisms/100 mL, with not more than 10 percent of samples exceeding 43 organisms/100 mL.

(ii) Dissolved oxygen.

(A) Freshwater – dissolved oxygen shall exceed 8.0 mg/L.

(B) Marine water – dissolved oxygen shall exceed 6.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 6.0 mg/L, natural dissolved oxygen levels can be degraded by up to 0.2 mg/L by man-caused activities.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature shall not exceed 18.0°C (freshwater) or 16.0°C (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t = 28 / (T + 7)$ (freshwater) or $t = 12 / (T - 2)$ (marine water).

When natural conditions exceed 18.0°C (freshwater) and 16.0°C (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8°C, and the maximum water temperature shall not exceed 18.3°C (freshwater).

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) or 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.5 units.

(vi) Turbidity shall not exceed 5 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 10 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those of public health significance, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect any water use.

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste.

(3) Class B (good).

(a) General characteristic. Water quality of this class shall meet or exceed the requirements for most uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (industrial and agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam, oyster, and mussel rearing and spawning.

Crustaceans and other shellfish (crabs, shrimp, crayfish, scallops, etc.) rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (secondary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria.

(i) Fecal coliform organisms.

(A) Freshwater – fecal coliform organisms shall not exceed a geometric mean value of 200 organisms/100

mL, with not more than 10 percent of samples exceeding 400 organisms/100 mL.

(B) Marine water – fecal coliform organisms shall not exceed a geometric mean value of 100 organisms/100 mL, with not more than 10 percent of samples exceeding 200 organisms/100 mL.

(ii) Dissolved oxygen.

(A) Freshwater – dissolved oxygen shall exceed 6.5 mg/L.

(B) Marine water – dissolved oxygen shall exceed 5.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 5.0 mg/L, natural dissolved oxygen levels can be degraded by up to 0.2 mg/L by man-caused activities.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature shall not exceed 21.0°C (freshwater) or 19.0°C (marine water) due to human activities. Temperature increases shall not, at any time, exceed $t = 34/(T+9)$ (freshwater) or $t = 16/T$ (marine water).

When natural conditions exceed 21.0°C (freshwater) and 19.0°C (marine water), no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

Provided that temperature increase resulting from nonpoint source activities shall not exceed 2.8°C, and the maximum water temperature shall not exceed 21.3°C (freshwater).

(v) pH shall be within the range of 6.5 to 8.5 (freshwater) and 7.0 to 8.5 (marine water) with a man-caused variation within a range of less than 0.5 units.

(vi) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vii) Toxic, radioactive, or deleterious material concentrations shall be below those which adversely affect public health during characteristic uses, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect characteristic water uses.

(viii) Aesthetic values shall not be reduced by dis-

solved, suspended, floating, or submerged matter not attributed to natural causes, so as to affect water use or taint the flesh of edible species.

(4) **Class C (fair).**

(a) General characteristic. Water quality of this class shall meet or exceed the requirements of selected and essential uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (industrial).

(ii) Fish (salmonid and other fish migration).

(iii) Recreation (secondary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(iv) Commerce and navigation.

(c) Water quality criteria – marine water.

(i) Fecal coliform organisms shall not exceed a geometric mean value of 200 organisms/100 mL, with not more than 10 percent of samples exceeding 400 organisms/100 mL.

(ii) Dissolved oxygen shall exceed 4.0 mg/L. When natural conditions, such as upwelling, occur, causing the dissolved oxygen to be depressed near or below 4.0 mg/L, natural dissolved oxygen levels can be degraded by up to 0.2 mg/L by man-caused activities.

(iii) Temperature shall not exceed 22.0°C due to human activities. Temperature increases shall not, at any time, exceed $t = 20/(T+2)$.

When natural conditions exceed 22.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C.

For purposes hereof, "t" represents the permissive temperature change across the dilution zone; and "T" represents the highest existing temperature in this water classification outside of any dilution zone.

(iv) pH shall be within the range of 6.5 to 9.0 with a man-caused variation within a range of less than 0.5 units.

(v) Turbidity shall not exceed 10 NTU over background turbidity when the background turbidity is 50 NTU or less, or have more than a 20 percent increase in turbidity when the background turbidity is more than 50 NTU.

(vi) Toxic, radioactive, or deleterious material concentrations shall be below those which adversely affect public health during characteristic uses, or which may cause acute or chronic toxic conditions to the aquatic

biota, or which may adversely affect characteristic water uses.

(vii) Aesthetic values shall not be interfered with by the presence of obnoxious wastes, slimes, aquatic growths, or materials which will taint the flesh of edible species.

(5) Lake class.

(a) General characteristic. Water quality of this class shall meet or exceed the requirements for all or substantially all uses.

(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

(i) Water supply (domestic, industrial, agricultural).

(ii) Stock watering.

(iii) Fish and shellfish:

Salmonid migration, rearing, spawning, and harvesting.

Other fish migration, rearing, spawning, and harvesting.

Clam and mussel rearing, spawning, and harvesting.

Crayfish rearing, spawning, and harvesting.

(iv) Wildlife habitat.

(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

(vi) Commerce and navigation.

(c) Water quality criteria.

(i) Fecal coliform organisms shall not exceed a geometric mean value of 50 organisms/100 mL, with not more than 10 percent of samples exceeding 100 organisms/100 mL.

(ii) Dissolved oxygen - no measurable decrease from natural conditions.

(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

(iv) Temperature - no measurable change from natural conditions.

(v) pH - no measurable change from natural conditions.

(vi) Turbidity shall not exceed 5 NTU over background conditions.

(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of

natural origin, which offend the senses of sight, smell, touch, or taste.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-045, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-045, filed 1/17/78.]

WAC 173-201-070 General classifications. General classifications applying to various surface water bodies not specifically classified under WAC 173-201-080 or 173-201-085 are as follows:

(1) All surface waters lying within the mountainous regions of the state assigned to national parks, national forests, and/or wilderness areas, are classified Class AA or lake class.

(2) All lakes and their feeder streams within the state are classified lake class and Class AA respectively, except for those feeder streams specifically classified otherwise.

(3) All reservoirs with a mean detention time of greater than 15 days are classified lake class.

(4) All reservoirs with a mean detention time of 15 days or less are classified the same as the river section in which they are located.

(5) All reservoirs established on preexisting lakes are classified as lake class.

(6) All unclassified surface waters that are tributaries to Class AA waters are classified Class AA. All other unclassified surface waters within the state are hereby classified Class A.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-070, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-070, filed 1/17/78; Order 73-4, § 173-201-070, filed 7/6/73.]

WAC 173-201-080 Specific classifications—Freshwater. Specific fresh surface waters of the state of Washington are classified as follows:

- | | |
|---|----------|
| (1) American River. | Class AA |
| (2) Big Quilcene River and tributaries. | Class AA |
| (3) Bumping River. | Class AA |
| (4) Burnt Bridge Creek. | Class A |
| (5) Cedar River from Lake Washington to Landsburg Dam (river mile 21.6). | Class A |
| (6) Cedar River and tributaries from Landsburg Dam (river mile 21.6) to headwaters. Special condition - no waste discharge will be permitted. | Class AA |
| (7) Chehalis River from upper boundary | |

of Grays Harbor at Cosmopolis (river mile 3.1, longitude 123°45'45" W) to Scammon Creek (river mile 65.8).

Class A

(8) Chehalis River from Scammon Creek (river mile 65.8) to Newaukum River (river mile 75.2). Special condition - dissolved oxygen shall exceed 5.0 mg/L from June 1, to September 15. For the remainder of the year, the dissolved oxygen shall meet Class A criteria.

Class A

(9) Chehalis River from Newaukum River (river mile 75.2) to Rock Creek (river mile 106.7).

Class A

(10) Chehalis River, from Rock Creek (river mile 106.7) to headwaters.

Class AA

(11) Chehalis River, south fork.

Class A

(12) Chewack River.

Class AA

(13) Chiwawa River.

Class AA

(14) Cispus River.

Class AA

(15) Clearwater River.

Class A

(16) Cle Elum River.

Class AA

(17) Cloquallum Creek.

Class A

(18) Clover Creek from outlet of Lake Spanaway to inlet of Lake Steilacoom.

Class A

(19) Columbia River from mouth to the Washington-Oregon border (river mile 309.3). Special conditions - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed 0.3°C due to any single source or 1.1°C due to all such activities combined. Dissolved oxygen shall exceed 90 percent of saturation.

Class A

(20) Columbia River from Washington-Oregon border (river mile 309.3) to Grand Coulee Dam (river mile 596.6). Special condition from Washington-Oregon border (river mile 309.3) to Priest Rapids Dam (river mile 397.1). Temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater

than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Class A

(21) Columbia River from Grand Coulee Dam (river mile 596.6) to Canadian border (river mile 745.0).

Class AA

(22) Colville River.

Class A

(23) Coweeman River from mouth to Mulholland Creek (river mile 18.4).

Class A

(24) Coweeman River from Mulholland Creek (river mile 18.4) to headwaters.

Class AA

(25) Cowlitz River from mouth to base of Riffe Lake Dam (river mile 52.0).

Class A

(26) Cowlitz River from base of Riffe Lake Dam (river mile 52.0) to headwaters.

Class AA

(27) Crab Creek and tributaries.

Class B

(28) Decker Creek.

Class AA

(29) Deschutes River from mouth to boundary of Snoqualmie National Forest (river mile 48.2).

Class A

(30) Deschutes River from boundary of Snoqualmie National Forest (river mile 48.2) to headwaters.

Class AA

(31) Dickey River.

Class A

(32) Dosewallips River and tributaries.

Class AA

(33) Duckabush River and tributaries.

Class AA

(34) Dungeness River from mouth to Canyon Creek (river mile 10.8).

Class A

(35) Dungeness River and tributaries from Canyon Creek (river mile 10.8) to headwaters.

Class AA

(36) Duwamish River from mouth south of a line bearing 254°true from the NW corner of berth 3, terminal No. 37 to the Black River (river mile 11.0) (Duwamish River continues as the Green River above the Black River).

Class B

(37) Elochoman River.

Class A

(38) Elwha River and tributaries.

Class AA

(39) Entiat River from Wenatchee National Forest boundary (river mile 20.5) to headwaters.

Class AA

(40) Grande Ronde River from mouth to Oregon border (river mile 37). Special condition - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise

the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

(41) Grays River from Grays River Falls (river mile 15.8) to headwaters.

(42) Green River (Cowlitz County).

(43) Green River (King County) from Black River (river mile 11.0 and point where Duwamish River continues as the Green River) to west boundary of Sec. 27-T21N-R6E (west boundary of Flaming Geyser State Park at river mile 42.3).

(44) Green River (King County) from west boundary of Sec. 27-T21N-R6E (west boundary of Flaming Geyser State Park, river mile 42.3) to west boundary of Sec. 13-T21N-R7E (river mile 59.1).

(45) Green River and tributaries (King County) from west boundary of Sec. 13-T21N-R7E (river mile 59.1) to headwaters. Special condition - no waste discharge will be permitted.

(46) Hamma Hamma River and tributaries.

(47) Hanaford Creek from mouth to east boundary of Sec. 25-T15N-R2W (river mile 4.1). Special condition - dissolved oxygen shall exceed 6.5 mg/L.

(48) Hanaford Creek from east boundary of Sec. 25-T15N-R2W (river mile 4.1) to headwaters.

(49) Hoh River and tributaries.

(50) Hoquiam River (continues as west fork above east fork) from mouth to river mile 9.3 (Dekay Road bridge) (upper limit of tidal influence).

(51) Humptulips River and tributaries from mouth to Olympic National Forest boundary on east fork (river mile 12.8) and west fork (river mile 40.4) (main stem continues as west fork).

(52) Humptulips River, east fork from Olympic National Forest boundary (river mile 12.8) to headwaters.

(53) Humptulips River, west fork from Olympic National Forest boundary (river mile 40.4) to headwaters.

Class A

Class AA

Class AA

Class A

Class AA

Class AA

Class AA

Class A

Class A

Class AA

Class B

Class A

Class AA

Class AA

(54) Issaquah Creek.

(55) Kalama River from lower Kalama River Falls (river mile 10.4) to headwaters.

(56) Klickitat River from Little Klickitat River (river mile 19.8) to headwaters.

(57) Lake Washington Ship Canal from Government Locks (river mile 1.0) to Lake Washington (river mile 8.6). Special condition - salinity shall not exceed one part per thousand (1.0 ppt) at any point or depth along a line that transects the ship canal at the University Bridge (river mile 6.1).

(58) Lewis River, east fork, from Multon Falls (river mile 24.6) to headwaters.

(59) Little Wenatchee River.

(60) Methow River from mouth to Chewack River (river mile 50.1).

(61) Methow River from Chewack River (river mile 50.1) to headwaters.

(62) Mill Creek from mouth to 13th street bridge in Walla Walla (river mile 6.4). Special condition - dissolved oxygen concentration shall exceed 5.0 mg/L.

(63) Mill Creek from 13th Street bridge in Walla Walla (river mile 6.4) to Walla Walla Waterworks Dam (river mile 25.2).

(64) Mill Creek and tributaries from city of Walla Walla Waterworks Dam (river mile 25.2) to headwaters. Special condition - no waste discharge will be permitted.

(65) Naches River from Snoqualmie National Forest boundary (river mile 35.7) to headwaters.

(66) Naselle River from Naselle "Falls" (cascade at river mile 18.6) to headwaters.

(67) Newaukum River.

(68) Nisqually River from mouth to Alder Dam (river mile 44.2).

(69) Nisqually River from Alder Dam (river mile 44.2) to headwaters.

(70) Nooksack River from mouth to Maple Creek (river mile 49.7).

(71) Nooksack River from Maple Creek (river mile 49.7) to headwaters.

(72) Nooksack River, south fork, from mouth to Skookum Creek (river mile 14.3).

(73) Nooksack River, south fork, from

Class A

Class AA

Class AA

Lake Class

Class AA

Class AA

Class A

Class AA

Class B

Class A

Class AA

Class AA

Class AA

Class A

Class A

Class AA

Class A

Class AA

Class A

20a

Skookum Creek (river mile 14.3) to headwaters.

Class AA

(74) Nooksack River, middle fork.

Class AA

(75) Okanogan River.

Class A

(76) Palouse River from mouth to south fork (Colfax, river mile 89.6).

Class B

(77) Palouse River from south fork (Colfax, river mile 89.6) to Idaho border (river mile 123.4). Special condition - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Class A

(78) Pend Oreille River from Canadian border (river mile 16.0) to Idaho border (river mile 87.7). Special condition - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

Class A

(79) Pilchuck River from city of Snohomish Waterworks Dam (river mile 26.8) to headwaters.

Class AA

(80) Puyallup River from mouth to river mile 1.0.

Class B

(81) Puyallup River from river mile 1.0 to Kings Creek (river mile 31.6).

Class A

(82) Puyallup River from Kings Creek (river mile 31.6) to headwaters.

Class AA

(83) Queets River and tributaries.

Class AA

(84) Quillayute River.

Class AA

(85) Quinault River and tributaries.

Class AA

(86) Salmon Creek (Clark County).

Class A

(87) Satsop River from mouth to west fork (river mile 6.4).

Class A

(88) Satsop River, east fork.

Class AA

(89) Satsop River, middle fork.

Class AA

(90) Satsop River, west fork.

Class AA

(91) Skagit River from mouth to Skiyou Slough-lower end (river mile 25.6).

Class A

(92) Skagit River and tributaries (in-

21a

cludes Baker, Suak, Suiattle, and Cascade rivers) from Skiyou Slough-lower end, (river mile 25.6) to Canadian border (river mile 127.0).

Class AA

(93) Skokomish River and tributaries.

Class AA

(94) Skookumchuck River from Bloody Run Creek (river mile 21.4) to headwaters.

Class AA

(95) Skykomish River from mouth to May Creek (above Gold Bar at river mile 41.2).

Class A

(96) Skykomish River from May Creek (above Gold Bar at river mile 41.2) to headwaters.

Class AA

(97) Snake River from mouth to Washington-Idaho-Oregon border (river mile 176.1). Special condition.

(a) Below Clearwater River (river mile 139.3). Temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$.

(b) Above Clearwater River (river mile 139.3). Temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed 0.3°C due to any single source or 1.1°C due to all such activities combined.

Class A

(98) Snohomish River from mouth and east of longitude 122°13'40"W upstream to latitude 47°56'30"N (southern tip of Ebey Island river mile 8.1). Special condition - fecal coliform organisms shall not exceed a geometric mean value of 200 organisms/100 mL, with not more than 10 percent of samples exceeding 400 organisms/100 mL.

Class A

(99) Snohomish River upstream from latitude 47°56'30"N (southern tip of Ebey Island river mile 8.1) to confluence with Skykomish and Snoqualmie River (river mile 20.5).

Class A

| | |
|--|----------|
| (100) Snoqualmie River and tributaries from mouth to west boundary of Twin Falls State Park on south fork (river mile 9.1). | Class A |
| (101) Snoqualmie River, middle fork. | Class AA |
| (102) Snoqualmie River, north fork. | Class AA |
| (103) Snoqualmie River, south fork, from west boundary of Twin Falls State Park (river mile 9.1) to headwaters. | Class AA |
| (104) Soleduck River and tributaries. | Class AA |
| (105) Spokane River from mouth to Idaho border (river mile 96.5). Special condition - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$. | Class A |
| (106) Stehekin River. | Class AA |
| (107) Stillaguamish River from mouth to north and south forks (river mile 17.8). | Class A |
| (108) Stillaguamish River, north fork, from mouth to Squire Creek (river mile 31.2). | Class A |
| (109) Stillaguamish River, north fork, from Squire Creek (river mile 31.2) to headwaters. | Class AA |
| (110) Stillaguamish River, south fork, from mouth to Canyon Creek (river mile 33.7). | Class A |
| (111) Stillaguamish River, south fork, from Canyon Creek (river mile 33.7) to the headwaters. | Class AA |
| (112) Sulphur Creek. | Class B |
| (113) Sultan River from mouth to Chaplain Creek (river mile 5.9). | Class A |
| (114) Sultan River and tributaries from Chaplain Creek (river mile 5.9) to headwaters. Special condition - no waste discharge will be permitted above city of Everett Diversion Dam (river mile 9.4). | Class AA |
| (115) Sumas River from Canadian border (river mile 12) to headwaters (river mile 23). | Class A |
| (116) Tieton River. | Class AA |
| (117) Tolt River, south fork and tributaries | |

| | |
|---|----------|
| ies from mouth to west boundary of Sec. 31-T26N-R9E (river mile 6.9). | Class AA |
| (118) Tolt River, south fork from west boundary of Sec. 31-T26N-R9E (river mile 6.9) to headwaters. Special condition - no waste discharge will be permitted. | Class AA |
| (119) Touchet River, north fork from Dayton water intake structure (river mile 3.0) to headwaters. | Class AA |
| (120) Toutle River, north fork, from Green River to headwaters. | Class AA |
| (121) Toutle River, south fork. | Class AA |
| (122) Tucannon River from Umatilla National Forest boundary (river mile 38.1) to headwaters. | Class AA |
| (123) Twisp River. | Class AA |
| (124) Union River and tributaries from Bremerton Waterworks Dam (river mile 6.9) to headwaters. Special condition - no waste discharge will be permitted. | Class AA |
| (125) Walla Walla River from mouth to Lowden (Dry Creek at river mile 27.2). | Class B |
| (126) Walla Walla River from Lowden (Dry Creek at river mile 27.2) to Oregon border (river mile 40). Special condition - temperature shall not exceed 20.0°C due to human activities. When natural conditions exceed 20.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t=34/(T+9)$. | Class A |
| (127) Wenatchee River from Wenatchee National Forest boundary (river mile 27.1) to headwaters. | Class AA |
| (128) White River (Pierce-King counties) from Mud Mountain Dam (river mile 29.6) to headwaters. | Class AA |
| (129) White River (Chelan County). | Class AA |
| (130) Wildcat Creek. | Class A |
| (131) Willapa River upstream of a line bearing 70° true through Mailboat Slough light (river mile 1.8). | Class A |
| (132) Wishkah River from mouth to river mile 6 (SW 1/4 SW 1/4 NE 1/4 Sec. 21-T18N-R9W). | Class B |

(133) Wishkah River from river mile 6 (SW 1/4 SW 1/4 NE 1/4 Sec. 21-T18N-R9W) to west fork (river mile 17.7).

Class A

(134) Wishkah River from west fork of Wishkah River (river mile 17.7) to south boundary of Sec. 33-T21N-R8W (river mile 32.0).

Class AA

(135) Wishkah River and tributaries from south boundary of Sec. 33-T21N-R8W (river mile 32.0) to headwaters. Special condition - no waste discharge will be permitted.

Class AA

(136) Wynoochee River from mouth to Olympic National Forest boundary (river mile 45.9).

Class A

(137) Wynoochee River from Olympic National Forest boundary (river mile 45.9) to headwaters.

Class AA

(138) Yakima River from mouth to Sunnyside Dam (river mile 103.8).

Class B

(139) Yakima River from Sunnyside Dam (river mile 103.8) to Cle Elum River (river mile 185.6). Special condition - temperature shall not exceed 21.0°C due to human activities. When natural conditions exceed 21.0°C, no temperature increase will be allowed which will raise the receiving water temperature by greater than 0.3°C; nor shall such temperature increases, at any time, exceed $t = 34 / (T + 9)$.

Class A

(140) Yakima River from Cle Elum River (river mile 185.6) to headwaters.

Class AA

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-080, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-080, filed 1/17/78; Order DE 73-22, § 173-201-080, filed 11/16/73; Order 73-4, § 173-201-080, filed 7/6/73.]

WAC 173-201-085 Specific classifications—Marine water. Specific marine surface waters of the state of Washington are classified as follows:

(1) Budd Inlet south of latitude 47°04'N (south of Priest Point Park).

Class B

(2) Coastal waters: Pacific Ocean from Ilwaco to Cape Flattery.

Class AA

(3) Commencement Bay south and east of a line bearing 258° true from "Brown's

point" and north and west of line bearing 225° true through the Hylebos waterway light.

Class A

(4) Commencement Bay, inner, south and east of a line bearing 225° true through Hylebos Waterway light except the city waterway south and east of south 11th Street.

Class B

(5) Commencement Bay, city waterway south and east of south 11th Street.

Class C

(6) Drayton Harbor, south of entrance.

Class A

(7) Dyes and Sinclair Inlets west of longitude 122°37'W.

Class A

(8) Elliott Bay east of a line between Pier 91 and Duwamish head.

Class A

(9) Everett Harbor, inner, north and east of a line bearing 121° true from light "4" (Snohomish River mouth).

Class B

(10) Grays Harbor west of longitude 123°59'W.

Class A

(11) Grays Harbor east of longitude 123°59'W to longitude 123°45'45"W (Cosmopolis Chehalis River, river mile 3.1). Special condition - dissolved oxygen shall exceed 5.0 mg/L.

Class B

(12) Guemes Channel, Padilla, Samish and Bellingham Bays east of longitude 122°39'W and north of latitude 48°27'20"N.

Class A
Class AA

(13) Hood Canal.

(14) Mukilteo and all North Puget Sound west of longitude 122°39'W (Whidbey, Fidalgo, Guemes and Lummi islands and state highway 20 bridge at Deception Pass), except as otherwise noted.

Class AA

(15) Oakland Bay west of longitude 123°05'W (inner Shelton harbor).

Class B

(16) Port Angeles south and west of a line bearing 152° true from buoy "2" at the tip of Ediz Hook.

Class A

(17) Port Gamble south of latitude 47°51'20"N.

Class A

(18) Port Townsend west of a line between Point Hudson and Kala point.

Class A

(19) Possession Sound, south of latitude 47°57'N.

Class AA

(20) Possession Sound, Port Susan, Saratoga Passage, and Skagit Bay east of

Whidbey Island and state highway 20 bridge at Deception Pass between latitude 47°57'N (Mukilteo) and latitude 48°27'20"N (Similk Bay), except as otherwise noted.

Class A

(21) Puget Sound through Admiralty Inlet and South Puget Sound, south and west to longitude 122°52'30"W (Brisco Point) and longitude 122°51'W (northern tip of Hartstene Island).

Class AA

(22) Sequim Bay southward of entrance.

Class AA

(23) South Puget Sound west of longitude 122°52'30"W (Brisco Point) and longitude 122°51'W (northern tip of Hartstene Island, except as otherwise noted).

Class A

(24) Strait of Juan de Fuca.

Class AA

(25) Willapa Bay seaward of a line bearing 70° true through Mailboat Slough light (Willapa River, river mile 1.8).

Class A

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-085, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-085, filed 1/17/78.]

WAC 173-201-090 Achievement considerations. To fully achieve and maintain the foregoing water quality in the state of Washington, it is the intent of the department to apply the various implementation and enforcement authorities at its disposal, including participation in the programs of the Federal Clean Water Act (P.L. 95-217) as appropriate. It is also the intent that cognizance will be taken of the need for participation in cooperative programs with other state agencies and private groups with respect to the management of related problems. The department's planned program for water pollution control will be defined and revised annually in accordance with section 106 of said federal act. Further, it shall be required that all activities which discharge wastes into waters within the state, or otherwise adversely affect the quality of said waters, be in compliance with the waste treatment and discharge provisions of state or federal law.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-090, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-090, filed 1/17/78; Order 73-4, § 173-201-090, filed 7/6/73.]

WAC 173-201-100 Implementation. (1) Discharges from municipal, commercial, and industrial operations. The primary means to be used for controlling municipal, commercial, and industrial waste discharges shall be through the issuance of waste disposal permits, as provided for in RCW 90.48.160 and following.

(2) Miscellaneous waste discharge or water quality effect sources. The director shall, through the issuance of regulatory permits, directives, and orders, as are appropriate, control miscellaneous waste discharges and water quality effect sources not covered by WAC 173-201-100(1) hereof. It is noted that, from time to time, certain short-term activities which are deemed necessary to accommodate essential activities or to otherwise protect the public interest may be specially authorized by the director as indicated in WAC 173-201-035 (8)(e), under such conditions as the director may prescribe, even though such activities may result in a reduction of water quality conditions below those criteria and classifications established by this regulation.

[Statutory Authority: RCW 90.48.035, 78-02-043 (Order DE 77-32), § 173-201-100, filed 1/17/78; Order 73-4, § 173-201-100, filed 7/6/73.]

WAC 173-201-110 Surveillance. A continuing surveillance program, to ascertain whether the regulations, waste disposal permits, orders, and directives promulgated and/or issued by the department are being complied with, will be conducted by the department staff as follows:

(1) Inspecting treatment and control facilities.

(2) Monitoring and reporting waste discharge characteristics.

(3) Monitoring receiving water quality.

[Statutory Authority: RCW 90.48.035, 78-02-043 (Order DE 77-32), § 173-201-110, filed 1/17/78; Order 73-4, § 173-201-110, filed 7/6/73.]

WAC 173-201-120 Enforcement. To insure that the provisions of chapter 90.48 RCW, the standards for water quality promulgated herein, the terms of waste disposal permits, and other orders and directives of the department are fully complied with, the following enforcement tools will be relied upon by the department, in cooperation with the attorney general as it deems appropriate:

(1) Issuance of notices of violation and regulatory orders as provided for in RCW 90.48.120. Under this section, whenever in the opinion of the department a person is violating or about to violate chapter 90.48 RCW, the department shall notify said person of its determination. Within thirty days said person shall notify the department of the action taken or being taken in response to the department's determination, whereupon the department may issue a regulatory order as it deems appropriate. Whenever the department deems immediate action is necessary to accomplish the purposes of chapter 90.48 RCW, it may issue a regulatory order without first giving notice and thirty days for response.

(2) Initiation of actions requesting injunctive or other appropriate relief in the various courts of the state, as provided for in RCW 90.48.037.

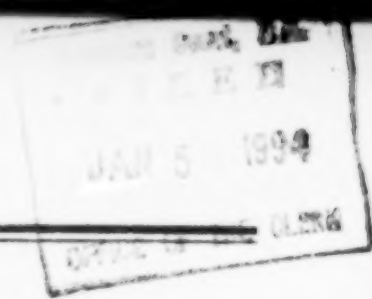
(3) Levying of civil penalties as provided for in RCW 90.48.144. Under this section, the director may levy a civil penalty up to five thousand dollars per day against a person who violates the terms of a waste discharge permit, or who discharges without such a permit when the same is required, or violates the provisions of RCW 90.48.080. If the amount of the penalty, which is subject to mitigation or remission by the department, is not paid within thirty days after receipt of said notice, the attorney general, upon request of the director, shall bring an action in superior court to recover the same.

(4) Initiation of a criminal proceeding by the appropriate county prosecutor, as provided for in RCW 90.48.140.

(5) Issuance of regulatory orders or directives as provided for in RCW 90.48.240.

[Statutory Authority: RCW 90.48.035, 82-12-078 (Order DE 82-12), § 173-201-120, filed 6/2/82; 78-02-043 (Order DE 77-32), § 173-201-120, filed 1/17/78; Order 73-4, § 173-201-120, filed 7/6/73.]

No. 92-1911



IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PUD No. 1 of JEFFERSON COUNTY
AND THE CITY OF TACOMA,

Petitioners,
v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE

On Writ of Certiorari to the
Supreme Court of the State of Washington

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1911

PUD No. 1 OF JEFFERSON COUNTY
 AND THE CITY OF TACOMA,

Petitioners,
 v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
 DEPARTMENT OF FISHERIES AND
 DEPARTMENT OF WILDLIFE

On Writ of Certiorari to the
 Supreme Court of the State of Washington

REPLY BRIEF FOR THE PETITIONERS

The State of Washington and its supporting amici appear to agree with Petitioners ("Tacoma") that this case presents issues of federal law concerning: the scope of the delegation of certification authority to the States in § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341; the requirements applicable to the Elkhorn Project under CWA § 303 water quality standards, 33 U.S.C. § 1313; and whether Washington's statute requiring maintenance of base flows to preserve fish habitat (Washington Revised Code ("RCW") 90.54.020(3)(a) (1992)) is an "appropriate requirement of State law" under § 401(d)'s grant of authority to condition water quality certifications. Washington has abandoned its earlier claim (Wash. Br. in Opp. 14) that the decision below rests on an adequate and independent State ground. Washington and its amici have also repudiated a principal ground for the Washington Supreme Court's ruling that the phrase "any other appropriate requirement of State law" in § 401(d) refers not only to water quality standards but to "all state action

related to water quality" (Pet. App. 13a).¹ Wash. Br. 15 n.19; Am. Riv. Br. 10 n.4; U.S. Br. 17-18 n.7.

Tacoma does not question the State's authority under § 401 to assure that any properly defined and identified discharges from the Elkhorn Project into navigable waters comply with Washington's water quality standards under § 303, and with any other State law appropriate to the standards and limitations enumerated in § 401. The Washington Supreme Court, however, rejected Tacoma's argument that "water quality standards are limited to pollution and discharges, as opposed to stream flow levels" (Pet. App. 9a-10a). It sustained the streamflow conditions imposed in the certificate (Pet. App. 83a) not because specific discharges would have a polluting effect, but because the project itself will alter the flow of the Dosewallips River in the by-pass reach. The court erred. Congress limited State § 401 authority to prevention of polluting "discharges" from federally licensed activities. It never intended alterations of streamflows by diversions or impoundments to be treated as "pollution" *per se* under the CWA. Washington therefore lacked authority under § 401 to limit the quantities of water the Elkhorn Project could divert for hydroelectric purposes.

Washington has a forum for its interests, however. Under FPA § 10(j), 16 U.S.C. § 803(j), FERC must base its own fish habitat conditions on Washington's recommendations unless it finds that they are "inconsistent with the purposes and requirements of [FPA Part I] or other applicable law". Section 10(j) protects Washington's concerns and preserves Tacoma's ability to continue its pursuit of a license.² Section 401 of the CWA was in-

¹ The repudiated ground is the holding (Pet. App. 11a-13a) that the enumeration of § 303 (water quality standards) in § 401(a), but the omission from § 401(d) of a reference to § 303, reflected Congressional intent not to limit State conditioning authority under § 401(d).

² If this Court holds the certificated streamflow conditions legally invalid, Tacoma would contest them before FERC. Tacoma has

tended to ensure that discharges from federally licensed projects comply with State water quality standards. Washington wrongly inflates such certification into a comprehensive scheme that supplants the federal licensing process.

I. A CONCRETE QUESTION CONCERNING THE RELATIONSHIP OF THE FPA AND THE CWA IS PRESENTED

The United States' assertion that the relationship between Part I of the FPA and State authority under § 401 need not be considered in this case (U.S. Br. 22-29) is without merit. States have resorted to § 401 because they are otherwise preempted (*California v. FERC*, 495 U.S. 490 (1990)) from unilaterally imposing streamflow conditions on hydroelectric licenses under the FPA.³ The United States' argument ignores the preclusive effects of Washington's § 401 conditions on Tacoma's ability to obtain a federal hydroelectric license. Those effects result from both economic⁴ and legal considerations. It would be futile for Tacoma to continue the licensing process unless it can contest Washington's flow conditions before FERC. FERC's ability to determine whether, under FPA § 10(j), it should reject Washington's flow conditions depends on proper construction of § 401 of the CWA. Therefore, the relationship between State certification authority under the CWA and the requirements of the FPA presents an immediate and concrete issue that is ripe for decision. *Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190, 201-202 (1983).

not conceded that the § 401 flows are necessary to protect fish habitat in the by-pass reach.

³ See *The Federal Energy Regulatory Commission's Hydropower Licensing Program: Hearing before the Environment, Energy and Natural Resources Subcommittee of the Committee on Government Operations*, 102nd Cong., 2d Sess. 5 (1992) (hereinafter "1992 FERC Hearings") (Statement of Gail Ann Greely).

⁴ The challenged conditions render the Project economically infeasible (Tacoma Br. 12-13 n.7).

The United States offers no support whatsoever for its assertion that FERC might impose different conditions despite § 401(d)'s express requirement that any certification under § 401 "shall become a condition on any Federal license or permit subject to the provisions of this section." The United States also fails to discuss FERC's decisions holding that the Commission has no authority to reject or revise conditions in a State water quality certification, even when it concludes that such conditions are outside the scope of § 401.⁵ The United States also overlooks FERC decisions refusing to conduct hearings on appropriate § 10(j) conditions where a State has "pre-empted" the § 10(j) process with its own conditions under CWA § 401(d).⁶

Comparing its argument to *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-779 (1984), the United States asserts that if FERC were to adopt streamflow conditions inconsistent with Washington's § 401 certificate requirements, then any conflict could be tested on review of the FERC license under § 313(b), 16 U.S.C. § 8251(b) of the FPA (U.S. Br. 27-29). Since FERC's current position is that it will not reexamine such conditions, it is the United States' argument, not Tacoma's, that is hypothetical. Because the conditions in *Escondido* were imposed on the license under the requirements of FPA § 4(e), 16 U.S.C. § 797 (e), the Court held that they were subject to review like

⁵ *Town of Summersville*, 60 FERC ¶ 61,291 at 61,990 (1992); *Carex Hydro*, 52 FERC ¶ 61,216 at 61,770 (1990); *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172-61,173 (1990).

⁶ *Puget Sound Power & Light Co.*, 64 FERC ¶ 61,045 at 61,372 (1993). In *Puget Sound*, the FERC denied Puget's motion for an evidentiary hearing on instream flow issues on the ground that it had no authority to establish minimum flows lower than those set forth in the State § 401 certification. Because that certification is being challenged by Puget Sound in State and federal courts, FERC later rescinded its denial of the request until those challenges are resolved. *Puget Sound Power & Light Co.*, 65 FERC ¶ 61,050 at 61,439 (1993). See also *OMYA, Inc.*, 62 FERC ¶ 62,224 at 63,417-63,418 (1993).

other license conditions under § 313(b). 466 U.S. 778 n.19. The scheme of the CWA is different. When a State denies, grants, or grants on conditions a § 401 certificate, it is proceeding under federal authority delegated in § 401 of the CWA. It has been uniformly held that jurisdiction to review State determinations under § 401 lies exclusively in the State courts.⁷ Congress did not intend "that a challenge to certification or its denial be incorporated in a broader challenge to a federal permit." *Town of Sutton v. Water Supply and Pollution Control Comm'n*, 355 A.2d 867, 870 (N.H. 1976).

The United States also does not explain how, under preclusion and "full faith and credit" principles, Tacoma could relitigate the certification conditions before FERC or another court if the judgment below is affirmed.⁸ Since § 511(c)(2), 33 U.S.C. § 1371(c)(2), of the CWA bars federal agencies from reviewing State § 401 certificates *sua*

⁷ *Roosevelt Campobello Int'l-Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *United States Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3rd Cir. 1988); 40 C.F.R. § 124.55(e). A different case might be presented if a State has no procedure whatsoever for judicial review of a § 401 certificate. See *Summit Hydropower Partnership v. Comm'r of Env'tl. Protection*, 629 A.2d 367 (Conn. 1993) (Connecticut courts lack jurisdiction to review denial of § 401 certificates).

⁸ See *Lake Erie Alliance for Protection of Coastal Corridor v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981), cert. denied, 464 U.S. 915 (1983) (state court affirmance of § 401 certification *res judicata* in federal court review of federal permit); See also *United States v. Utah Constr. and Mining Co.*, 384 U.S. 394, 421-422 (1966) (*res judicata* applies to administrative determinations); *Blonder-Tongue Lab. Inc. v. University of Ill. Found.*, 402 U.S. 313, 327 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (collateral estoppel bars relitigation of resolved claim against another party). In addition, a court of appeals reviewing a final hydroelectric license would be bound to give full faith and credit to the judgment of the Washington Supreme Court sustaining the streamflow conditions in the § 401 certificate. 28 U.S.C. § 1738.

sponte even under the provisions of the National Environmental Policy Act, FERC's abandonment of its current policy of refusing to re-examine § 401 certificate conditions would seem to be not only unlikely, but questionable.⁹

II. DAMS AND DIVERSION STRUCTURES ARE NOT 'POLLUTION' *PER SE*

The contention of Washington (Wash. Br. 33) and American Rivers, *et al.* (Am. Riv. Br. 16) that a dam is a "discharge" under the CWA because its construction involves the discharge of dredged and fill material subject to a Corps of Engineers permit under § 404, 33 U.S.C. § 1344, amounts to an assertion that all dam and diversion structures are pollution *per se*. The Washington Supreme Court did not hold that discharge of such materials during the Elkhorn Project's construction justified the streamflow conditions imposed on the completed structure under § 401, nor did it decide the scope of the Corps of Engineers' permitting authority under § 404.¹⁰ The proper

⁹ Also without merit is the United States' suggestion (U.S. Br. 28 n.13) that the Elkhorn Project may ultimately be defeated by whatever policy the federal government finally adopts to reconcile protection of the northern spotted owl on the Olympic Peninsula with economic development in the State of Washington. Tacoma must satisfy numerous State and federal permitting requirements, including those under the Endangered Species Act, before it can be granted an acceptable hydroelectric license by FERC. In this case, Tacoma seeks only the right to continue pursuit of appropriate streamflow conditions. The § 401 conditions and the record in this case are not based on harm to the spotted owl. Moreover, the record does not contain any survey for spotted owls in the area of the Elkhorn Project. If Tacoma prevails here, the Project will be examined by FERC in light of the President's *Forest Management Plan* of July 1, 1993, which includes economics in the balance, and whatever regional Forest Plan finally emerges.

¹⁰ The water quality certificate at issue contains specific construction activity conditions (Pet. App. 84a) which are not challenged in this proceeding. Tacoma has assured FERC that six months prior to construction it will apply for a § 404 permit for discharge of dredged and fill materials. R., PCHB Ex. A-4 Elkhorn Hydroelectric Project, Application for License 8 (1986).

scope of such authority and the effect of § 401 certificates on § 404 permits are not issues before this Court.

In any event, § 404 requires a permit for the discharge of dredged and fill material used during the construction of dams and diversion structures. *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (D.C. Cir.), cert. denied, 484 U.S. 816 (1987).¹¹ Whether § 404 extends beyond such discharges during construction to the regulation of activities and impacts incidental to the resulting structure is being contested in other litigation.¹² For purposes of this case, the significant point is that in the CWA, Congress did not declare all dams and diversion structures to be "pollution" *per se*. On the contrary, Congress has treated such structures and their consequences in express but limited terms.¹³ This selective treatment is in direct con-

¹¹ In *Monongahela Power* the court of appeals reversed a district court determination that no § 404 permit was required for the discharge of fill material into navigable waters during construction of a hydroelectric facility previously licensed by the Federal Power Commission. The court dealt only with the ruling that the FPC's licensing authority created an implied exemption from the Corps permitting authority under § 404. It did not reach any other procedural or substantive contention. 809 F.2d at 53 n.118.

¹² *Alameda Water and Sanitation Dist. v. Browner*, No. 91-M-2047 (D. Colo.) (EPA veto under § 404(c) of Corps of Engineers permit for municipal water supply project approved by State); *American Mining Congress v. U.S. Army Corps of Eng'rs*, No. 93-1754 (D.D.C.) (challenge to regulations for discharges of dredged and fill materials published at 58 Fed. Reg. 45,008 (August 25, 1993)).

¹³ See *e.g.*, CWA §§ 102(b)(2) and (6), 33 U.S.C. §§ 1252(b)(2) and (6) (at federal reservoirs and at FPA-licensed projects, EPA to determine storage for regulation of streamflow for water quality purposes; storage for other streamflow purposes reserved to federal agency managing federal reservoir or FERC); § 304 (f)(2)(F), 33 U.S.C. § 1314(f)(2)(F) (EPA to issue information on methods to control pollution resulting from dams and flow diversion facilities); §§ 404(f)(1) and (2) (discharges of dredged and fill material associated with repairs and maintenance on existing dams exempt from § 404 permit requirements, but such permits required for such discharges when "incidental" to activities that may impair the flow, circulation or reach of navigable

flict with Washington's attempt to sweep all such structures wholesale into the definition of "pollution" in CWA § 502(19), 33 U.S.C. § 1362(19).

Moreover, the assertion that a dam-in-place is a "discharge" (Wash. Br. 33) is wrong. First, it is contrary to the plain English meaning of the unqualified term "discharge" as it is used in § 401. Second, Washington seems to assume that once *any* discharge has been identified with an activity (such as a discharge of dredged and fill material during the process of construction), then the State can, under § 401(d), condition the activity itself rather than specific discharges from it. Section 401's plain terms, however, apply only to "such discharge" as results from the licensed activity,¹⁴ not to the activity causing the discharge. Congress made this intent clear when it substituted § 401(a)'s express references to discharges for the 1970 provision's reference to "such activity" (Tacoma Br. 26-27).¹⁵ Ultimately, Washington's argument rests on its contention that any alteration of streamflow that may affect fish habitat is "pollution" (Wash. Br. 29 n.36). "Pollution" for the purposes of the CWA refers to contaminants that reduce water quality, not non-contaminating

waters); Water Quality Act of 1987, § 524, Pub. L. No. 100-4, 101 Stat. 89, 33 U.S.C. § 1375, note (EPA is required to report to Congress on water quality effects of impoundments).

¹⁴ Washington's further argument that construction will cause discharges of pollutants (dredged spoils and concrete) and non-point source pollution (soil erosion) (Wash. Br. 35) is not relevant to the specification of streamflow quantities in the § 401 certificate. Such consequences were not cited as a ground for regulating streamflow in the § 401 certificate or the Washington Supreme Court's opinion.

¹⁵ It appears that the former provision, CWA § 21(b), as added in 1970 by § 103, P.L. 91-224, 84 Stat. 108 (1970), was also limited to discharges. The limitation is indicated by the references to "discharge" in former §§ 21(b)(2) and (3). EPA's current § 401 regulations, adopted in 36 Fed. Reg. 22,487 (November 25, 1971), refer to certification of "activities". 40 C.F.R. § 121.2. They have not been revised to comply with the text of current § 401 and are therefore not an authoritative construction of that provision.

alterations of water quantity. Moreover, the term "pollution" is not used substantively in any of the sections enumerated in § 401 (See Tacoma Br. 40-41).

The United States does not appear to agree that dams themselves are discharges. It seeks the same result, however, by contending (U.S. Br. 12-14) that all "indirect" effects of a structure resulting from the deposit of dredged and fill material can be regulated under § 401. Like Washington, it converts § 401's certification of discharges into a super-license for the activity's operations. The alteration of streamflow by a dam or diversion structure is not a discharge, but a consequence of the stabilization or impoundment caused by the completed structure. Congress has expressly limited State certification under § 401 to "discharges" from activities authorized by a federal license or permit. Section 401 does not apply to discharges of dredged and fill material for the repair and maintenance of existing dams and dikes because they are exempt from the requirement for a § 404 permit. CWA § 404(f)(1)(B), 33 U.S.C. § 1344(f)(1)(B). As for new structures, under § 404(f)(2) Congress requires § 404 permits (and thus § 401 certifications) only for discharges "incidental to any activity having as its purpose" a new impairment of the flow or circulation, or reduction of the reach of navigable waters. On its face, § 404(f)(2) is limited to discharge of a particular kind of pollutant when incidental to the construction of a new dam.¹⁶ The "indirect effects" argument of the United States turns the meaning of both §§ 401(a) and 404(f)(2) upside down, because the argument would authorize direct regulation of the activity incidental to a discharge, instead of regulation of a discharge incidental to the licensed (or permitted) activity.¹⁷

¹⁶ The distinction between State control of polluting discharges under § 401, and authority to review the general environmental effects of the discharge of dredged or fill material under § 404, is correctly recognized in *Commonwealth Dep't of Envtl. Resources v. City of Harrisburg*, 578 A.2d 563, 567 (Pa. Commw. 1990).

¹⁷ The United States is also mistaken in its reliance on § 401(a)(3), which provides that a certificate for discharges associated

A similar misapprehension is reflected in American Rivers' contention (Am. Riv. Br. 3, 15) that changes in the flow of waters caused by dams and diversion facilities are "pollution" within the meaning of § 304(f)(2)(F). The plain language of § 304(f)(2)(F) directs EPA to issue information concerning methods for controlling pollution *resulting* from dams and diversion structures. It does not say that either the structures or changes they cause *are* pollution.

III. THE PRESCRIPTION OF STREAMFLOW QUANTITIES IN § 401 CERTIFICATES IS A PROHIBITED DIRECT REGULATION OF QUANTITY, NOT AN INCIDENTAL EFFECT OF REGULATING THE WATER QUALITY OF DISCHARGES FROM HYDROELECTRIC DIVERSION STRUCTURES

Respondents and amici extend CWA §§ 401 and 303 beyond the limits Congress intended by invoking them to directly regulate streamflow quantities, *i.e.*, the volume of water measured in cubic feet per second that must be left in the stream (Pet. App. 83a). In its opening brief (Tacoma Br. 37-42) Tacoma demonstrated that Congress did not intend that CWA §§ 401 and 303 be applied to regulate the diversion of water quantities. The fact that the State of Washington rather than the federal government is attempting under § 401 to regulate quantities does not, as Washington contends (Wash. Br. 18), bring the attempt within the scope of the CWA. The regulation of quantities does not depend on which government is acting, but on the law that is being applied. The law being applied here, as the Washington Supreme Court

with construction is also to apply to operations of the facility. The effect of § 401(a)(3) is to require that *operational* discharges—properly defined—be considered at the same time that discharges resulting from *construction* are considered. A certification issued prior to construction remains in effect under § 401(a)(1) unless, prior to operation, notice is given that such operation will no longer comply with the enumerated requirements in § 401 because of changes in the facilities, the receiving waters, applicable water quality criteria or applicable effluent limitations or other requirements.

recognized (Pet. App. 14a-15a), is *federal*: the Clean Water Act. The § 303 water quality standards invoked under § 401 are federally reviewed, controlled and supervised. Such standards must comply with EPA's requirements; if they do not, EPA itself becomes the default regulator prescribing and administering appropriate water quality standards. CWA § 303(c)(3). Similarly, if a State lacks authority to issue § 401 certifications, the EPA performs that function. Section 401(a)(1). The legislative history of § 303 (Tacoma Br. 36-37), and the express provisions in §§ 510(2), 33 U.S.C. § 1370(2), and 101(g), 33 U.S.C. § 1251(g) clearly demonstrate that Congress intended to confine the CWA to water quality, as opposed to water quantity, precisely because the federal role is pervasive and controlling. American Rivers' contention (Am. Riv. Br. 28) that protection of water quality need avoid interference with water rights only "*where possible*" (*italics in original*) improperly erases the clear line between water quality and water quantity Congress reconfirmed when it enacted § 510 in 1972 and § 101(g) in 1977.¹⁸

The contention of the United States (U.S. Br. 19 n.8) that §§ 101(g) and 510(2) have no bearing on this case misapprehends Tacoma's argument. Tacoma does not assert that there can be no practical relationship between water quantity and water quality. Rather, Congress has

¹⁸ Section 101(g) was sponsored by Senator Wallop. He explained that it was intended to forestall recent proposals that would have effectuated "Federal purposes that were not strictly related to water quality. Those other purposes might include, but were not limited to Federal land use planning, plant siting and production planning purposes. This 'state's jurisdiction' amendment reaffirms that it is the policy of Congress that this Act is to be used for water *quality* purposes." 123 Cong. Rec. 39,211-39,212 (1977), reprinted in *A Legislative History of the Clean Water Act of 1977; A Continuation of the Legislative History of the Federal Water Pollution Control Act*, 95th Cong. 2d Sess. 531 (1978) (*emphasis added*). Senator Wallop's further statement that measures *incidentally* affecting the allocation of water quantities are permissible in the challenged § 401 certificate under the Act does not permit direct regulation of quantities.

drawn a legal distinction for the purposes of regulating water under the CWA. Other laws, particularly the FPA, authorize the direct regulation of streamflow quantities for fish habitat purposes.¹⁹ The quality/quantity distinction applies here because, for purposes of the CWA, there is no difference between diversion of quantities for hydroelectric uses, and diversion for other proprietary purposes. Congress simply excluded the allocation of quantities from direct regulation under the CWA.²⁰

IV. PROTECTED "USES" CANNOT BE APPLIED AS WATER QUALITY STANDARDS APART FROM "CRITERIA"

Notwithstanding the conjunction of uses and criteria in § 303(c)(2)(A), Washington and its amici insist that water quality standards can be implemented in a § 401 certificate on the basis of designated uses alone. The argument is inconsistent with the language of the statute. It also renders water quality standards unenforceably vague. Such standards must be comprehensible to entities which must comply with them, to officials who

¹⁹ The quality/quantity distinction is expressly recognized in CWA § 102(b)(2): "The need for and the value of storage for regulation of streamflow (other than water quality) including but not limited to * * * fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal agencies." Section 102(b)(6) draws the same distinction for hydroelectric projects licensed under the FPA.

²⁰ *American Rivers* (Am. Riv. Br. 18), but not the United States, appears to cite *Riverside Irrig. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985) in support of the "indirect effects" argument. That case rejected a claim that a proposal to construct a dam and reservoir was entitled to a nationwide permit to discharge dredge and fill material under § 404 and 33 C.F.R. § 330.4. The court said that § 101(g) was mere preamble (*id.* at 513). The court held, however, that accommodation of the Act's policies limiting jurisdiction over water quantities and environmental concerns should be determined in an individual, not a nationwide permit proceeding. Thus the ultimate scope of the Corps' authority to regulate quantities for environmental purposes was remitted to decision in the individual permit proceeding. The proper scope of State authority under § 401 was not at issue.

enforce them, and to the permit writers whose role is central to the CWA's system for controlling discharges of pollutants. CWA § 301(a), 33 U.S.C. § 1311(a). "Uses" alone do not provide meaningful guidance because they typically cover such a broad range of salutary, but often conflicting societal goals. For example, Washington's characteristic uses include factors such as domestic, agricultural and industrial water supply; fish and shellfish rearing, spawning and harvesting; and "recreation (primary contact recreation, sport fishing, boating and aesthetic enjoyment)". Washington Administrative Code ("WAC"), 173-201-045(b) reproduced at Wash. Br. App. 8a. Water supply needs may conflict with recreational fishing; recreational fishing may conflict with industrial diversions. Yet all are water "uses" under § 303. Such uses, in and of themselves, cannot be meaningfully applied to prevent polluting discharges. That is why Congress said in § 303(c)(2)(A) that water quality standards "shall consist of designated uses * * * and the water quality criteria * * * based upon such uses." (emphasis added). The criteria provide comprehensible parameters to guide compliance and enforcement.²¹ On the other hand, if § 401 discharge certificates can be granted, denied or conditioned solely on the basis of uses, then the States (or EPA) can impose any requirement related to the use of water by a federally licensed activity. Section 401 would become a federal licensing scheme for water use, rather than a limited delegation by which States can prevent polluting discharges.

Washington expressly concedes that the Elkhorn Project "will likely not violate any of Washington's water quality criteria" (Wash. Br. 24). The § 401 certification itself states that the prescribed flows are "in excess of

²¹ Section 401(a)(3) refers directly to water quality criteria (see pp. 9-10 n.17). An express ground for a § 401(a)(3) determination is a change in "the water quality criteria applicable to such waters" (emphasis added). This provision permits States to modify their criteria if some new contaminant, not covered by criteria at the time a certification was issued, may be discharged when operations begin (see Am. Riv. Br. 21-22).

those required to maintain water quality in the bypass region" (Pet. App. 82a). These concessions explain Washington's insistence that broad ranging goals for the use of water should be an independent basis for determining compliance with its § 303 water quality standards in a § 401 certification. The distinction between designated uses and criteria, however, is not a technical formality invented by Tacoma. It is the product of Congress' careful revision of § 5(c) of the Water Quality Act of 1965 as reflected in the current language in § 303(c)(2). Washington's suggestion that the criteria requirement can be evaded by simply transferring designated uses into the criteria section of water quality standards (Wash. Br. 24 n.29) ignores the use/criteria distinction in § 303(c)(2)(A).

The omission of specific pollutants from a State's water quality criteria would not allow the discharge of such pollutants into navigable waters, as Vermont, *et al.*, mistakenly contend (Vt. Br. 24-25). Under § 301(a), the discharge of any pollutant from a point source is prohibited unless expressly authorized by a permit under § 402, 33 U.S.C. § 1342, and in compliance with, *inter alia*, § 303 water quality standards. The term "pollutant" includes "biological materials" such as antibiotics. CWA § 502(6). The § 402 permit limitation Vermont describes was not necessary to *prohibit* discharge of antibiotic materials not expressly listed in Vermont's water quality criteria. It was fashioned to *permit* such a discharge into Lake Champlain.

Washington's antidegradation policy (WAC 173-201-035(8) (Wash. Br. 5a-7a)) is a part of Washington's water quality standards approved by the EPA. Neither EPA's regulation requiring an antidegradation policy (40 C.F.R. § 131.12) nor Washington's expression of that policy in WAC 173-201-035(8) elevates uses that are protected by the policy to the level of independent enforcement mechanisms. Section 303(d)(4)(B), as added into the CWA in 1987 (101 Stat. 69), and EPA's regulations (40 C.F.R. §§ 131.11 and 131.12) literally pro-

vide that existing uses are to be maintained, and degradation is to be prevented, through the promulgation, maintenance and application of appropriate criteria or equivalent scientifically ascertainable parameters. Without such requirements, the crucial role of criteria in water quality standards would be swallowed up by the generalities contained in the descriptions of designated uses. *Arkansas v. Oklahoma*, — U.S. —, 112 S. Ct. 1046, 1059-60 and n.16 (1992). Far from being a form of insurance (Wash. Br. 24), the antidegradation policy would become a blank check for State control of federally licensed activities that use water.

Respondents and amici, invoking *Chevron United States, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), urge the Court to defer to selected statements in various EPA manuals, handbooks, testimony and letters. The manuals and handbooks cited provide no authority for judicial construction of either § 303 or EPA's regulations. They are informal advice prepared within EPA's internal bureaus. Such materials often reach for regulatory results beyond EPA's jurisdictional grasp. For example, American Rivers cites (Am. Riv. Br. 23) EPA's *Questions and Answers On: Antidegradation* (1985) as supporting a total disallowance of any activity "which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards". This informal advice proposes a policy entirely outside of water quality standards under § 303(c)(2).²² On the other hand, in its *Water Quality Standards Handbook*, EPA describes streamflows and dams as physical, non-water quality factors that may be limitations on "uses" for a water body. *Water Quality Standards Handbook*, p. 3-4 (Office of Water Regulations and Standards, EPA, 1983). The handbooks and manuals are not reasoned and authorita-

²² The same deficiency is apparent in American Rivers Contention (Am. Riv. Br. 25) that Washington's base flow statute (RCW 90.54.020(3)(a)) could have been incorporated into the criteria according to an EPA handbook, *Wetlands and § 401 Certification*.

tive constructions entitled to *Chevron* deference. Cf. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, No. 92-1074, slip op. at 20-23 (Sup. Ct. December 13, 1993). Such materials are at best informal staff guidance. They are not subject to pre-issuance public scrutiny or to post-issuance judicial review, and they do not bind the agency itself in particular rulings.²³ *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38-40 (D.C. Cir. 1974). Deference recognized under *Chevron* should be reserved for definitive interpretations adopted in rulemakings, adjudications or other proceedings authorized by Congress. Administrative Conference of the U.S., *Recommendation* 89-5, 1 C.F.R. 305.89-5.²⁴

Because of the increasingly intrusive and pervasive scope of environmental, health and safety regulation, *Chevron* deference should be confined to its intended function. *Chevron* is intended to permit policy choices to be made by politically answerable agencies within the scope

²³ Equally undeserving of *Chevron* deference are the statements of EPA's spokespersons cited by respondents and amici. The cited statements were issued in the ongoing bureaucratic dispute between FERC and EPA concerning appropriate jurisdiction over the use of water for hydropower licensing. They are advocacy pieces, not regulatory determinations. The cited statement of Deputy EPA Administrator Prothro reproduced by Vermont (Vt. Br. App. 10a-20a) was submitted to a Congressional subcommittee in the 1992 *FERC Hearings*, *supra*, p. 3 n.3. The cited letter of Assistant EPA Administrator Wilcher was written in response to a letter of July 25, 1990 from the Director of FERC's Office of Hydropower Licensing which sought EPA's assistance in preventing States from abusing their § 401 authority in hydroelectric licensing procedures. 1992 *FERC Hearings* at 232-234. Such statements are analogous to agency counsel's interpretations formulated during litigation, and like all such *post hoc* rationalizations, are entitled to no weight. See, e.g., *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988). See also *Estate of Cowart v. Nicklos Drilling Co.*, — U.S. —, 112 S. Ct. 2589, 2594 (1992).

²⁴ See Robert A. Anthony, *Which Agency Interpretations Should Bind the Courts and the Public*, a report prepared for the Administrative Conference of the United States, April 13, 1989, (revised and republished, 7 *Yale J. of Reg.* 1 (Winter 1990)).

of a delegation from Congress, when Congress has indicated no intent with respect to such choices. In this case the issue is the proper scope of the delegation from Congress to the States and EPA in §§ 401 and 303. Congress' choices are clear from the language of those sections. Even if this were not so, the Court, in determining the proper scope of the delegation within which the choice will be made, should recognize that ambiguous language is not itself a delegation. Cf. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Otherwise agencies (or States acting under agency guidance) might, as here, bootstrap themselves into areas where they lack jurisdiction. *Id.*

V. SECTION 401(d)'S REFERENCE TO "ANY OTHER APPROPRIATE REQUIREMENT OF STATE LAW" DOES NOT SUPPORT THE STREAMFLOW CONDITIONS REQUIRED

Washington (Wash. Br. 25-28), American Rivers (Am. Riv. Br. 25-26) and Vermont (Vt. Br. 28-29) claim that Washington's statute requiring base flows for perennial streams (RCW 90.54.020(3)(a)) is an "other appropriate requirement of State law" within the meaning of § 401(d) that provides an alternative basis for the streamflow quantities required in the § 401 certificate.²⁵ They seem to concede that the term "appropriate" in § 401(d) is a limitation. As noted above (pp. 1-2 and n.1), they have also repudiated one ground relied on below for the holding (Pet. App. 11a-13a) that § 401(d) is not limited to water quality standards and other limitations enumerated in § 401(a). The dispute between Tacoma and Washington, therefore, comes down to whether (without reliance on the repudiated ground) the "other appropriate requirement" clause incorporates any water-related State statute, or is limited to State laws that are appropriate to prevention of discharges that would pollute because of non-compliance with the water quality standards and limitations expressly enumerated in § 401(a).

²⁵ The United States does not reach this issue (U.S. Br. 17 n.6).

A State law giving advance notice of scientifically ascertainable parameters for controlling polluting discharges could be an "other appropriate" requirement of State law. The bare prescription, however, of a base flow requirement for fish habitat purposes under Washington's statute is not "appropriate". Section 401(d) shows that Congress intended State laws for controlling polluting discharges to be applied to specifically identified discharges in the same manner as the standards and limitations enumerated in § 401(a). They may be equivalent to or more stringent than such requirements. CWA § 510. In this case, the challenged conditions are not linked to any specific discharge that would have polluting effects inconsistent with State requirements analogous to § 303 criteria.

Washington's § 401(d) claim rests on its sweeping contention that "appropriate" in § 401(d) "simply means that the requirement must * * * relate to the activity in question and * * * be 'reasonably related' to the purposes and policies of the CWA" (Wash. Br. 27). Washington's emphasis on *activities* obliterates Congress' limitation of § 401 to the prevention of polluting discharges. It would substitute general goals (*i.e.*, preservation of fish habitat) for parameters equivalent to those contained in water quality criteria and other limitations. There would be no advance notice of what factors render a discharge unacceptable, except that the discharge must not be inconsistent with general and conflicting "uses". As recently held by the Court of Appeals of New York, such an "enlarged reading of 'appropriate requirement of state law' under subsection 401(d)" would countermand the limitations in § 401(a)(1) and would "contradict or undermine federal licensing by superimposing unrelated conditions not within the EPA mandates and specifications." *In Re Niagara Mohawk Power Corp. v. State Dep't of Env'tl. Conservation*, 82 N.Y.2d 191, 1993 N.Y. LEXIS 3887, at *13-*14 (N.Y. Nov. 11, 1993).²⁶

²⁶ In *Niagara Mohawk* a utility sought a declaratory ruling concerning the scope of New York's certification authority under § 401

When Congress intends to grant conditioning authority over hydroelectric projects to agencies other than the FERC, it does so in clear and specific terms. See, *e.g.*, FPA §§ 4(e) and 10(j); 43 U.S.C. § 1761(a)(4); see also, *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984); CWA § 404 (f)(2); *Monongahela Power Co. v. Marsh*, 809 F.2d 41 (1987). Absent such specificity, Part I of the FPA continues to apply with exclusive effect. *California v. FERC*, 495 U.S. 490 (1990); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946). The proper approach is reflected in EPA's 1989 *Dam Water Quality Study*, conducted pursuant to § 524 of the Water Quality Act of 1987, *supra* pp. 7-8 n.13. That study recognized the need for a balancing of water quality objectives with other primary operational purposes of hydroelectric facilities.²⁷ That, of course, is the fundamental role of FERC under Part I of the FPA.

as applied to its hydroelectric facilities subject to FERC licensing and relicensing. The State conservation agency ruled that under CWA § 401 it could require compliance with *all* State laws "which bear on water quality", including, *inter alia*, laws governing fish and wildlife, wetlands, dam safety and construction, and New York's comprehensive environmental statute. The Court of Appeals of New York held that § 401 delegates only limited authority, based on requirements affecting water quality. It ruled: "Review by state agencies that would overlap or duplicate the federal purview and prerogatives was not contemplated and would infringe on and potentially conflict with an area of law dominated by the nationally uniform federal statutory scheme [in Part I of the FPA]." Lexis *6.

²⁷ "Water quality impacts may be lessened by changes in the operational procedures of a dam. However, the majority of dams are not, and cannot be, operated solely for the purpose of achieving water quality objectives. Conflict of interest can occur if water quality objectives are added to the other primary operational purposes of the reservoir, such as flood control or power generation. The losses due to changes in operation for the primary uses would have to be compared to the benefits of protecting or enhancing stream uses." EPA, *Dam Water Quality Study. Report to Congress* at V-9 (NTIS Document PB93-167013, May 1989).

CONCLUSION

For the reasons stated in the Brief for Petitioners, the briefs of amici curiae supporting Petitioners, and this Reply Brief, the judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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14
No. 92-1911

Supreme Court, U.S.

FILED

DEC 14 1993

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

**PUD No. 1 of JEFFERSON COUNTY
AND CITY OF TACOMA, PETITIONERS**

v.

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE**

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON**

**BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING AFFIRMANCE**

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QUESTION PRESENTED

Whether the State of Washington exceeded its authority under federal law by conditioning a water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. 1341, for a hydroelectric project subject to a federal licensing requirement on the potential licensee's maintenance of minimum stream flow to assure that the use of the body of water as fish habitat will be preserved.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1911

PUD No. 1 OF JEFFERSON COUNTY
AND CITY OF TACOMA, PETITIONERS

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

The Environmental Protection Agency (EPA) is responsible for administering portions of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and the Army Corps of Engineers is responsible for administering a regulatory program under Section 404 of the CWA, 33 U.S.C. 1344. The Federal Energy Regulatory Commission (FERC) is responsible for administering the Federal Power Act (FPA), 16 U.S.C. 791 *et seq.* In addition, federal agencies frequently have to obtain certifications under Section 401 of the CWA, 33 U.S.C. 1341, in connection with various activities and, with respect to this particular

(1)

case, the land on which the hydropower project would be built is located within the Olympic National Forest and is owned by the United States. The United States therefore has a substantial interest in questions concerning the extent to which the State of Washington may impose conditions under Section 401(d) of the CWA on a facility that must obtain a hydropower license issued by FERC under the FPA.

STATUTES INVOLVED

The pertinent portions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, are reprinted at App., *infra*, 1a-16a.

STATEMENT

1. a. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through reduction and eventual elimination of the discharge of pollutants into those waters. CWA § 101(a), 33 U.S.C. 1251(a). In addition, Congress set as a national goal the attainment of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." CWA § 101(a)(2), 33 U.S.C. 1251(a)(2). To reach the stated goals, the Act anticipates a partnership between the federal government and the States.

The Administrator of the EPA is generally responsible for administering the Act. CWA § 101(d), 33 U.S.C. 1251(d). A major responsibility of the Administrator under the Act is to ensure that technology-based limitations are imposed on discharges. The Act thus provides for the development and promulgation of uniform national standards, known as "effluent limitations guidelines," for categories and classes of discharges from point sources and for the

imposition of limitations on a case-by-case basis. CWA §§ 301, 304, 33 U.S.C. 1311, 1314; *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 126-136 (1977). See CWA §§ 502(11) and (14), 33 U.S.C. 1362(11) and (14) (definitions of "effluent limitation" and "point source").

b. A second major source of authority for meeting the goals of the CWA is found in Section 303, which directs States, with federal approval and oversight, to institute a range of comprehensive standards, potentially more stringent than the national technology-based limitations, to assure protection of the quality of all state waters. 33 U.S.C. 1313(a), (b), and (c)(1). Such water quality standards provide "a supplementary basis * * * so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976).

Unlike the national industry-specific effluent limitations, state water quality standards are not technology-based requirements; instead, each State's water quality standards "define[] the water quality goals of a water body * * * by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. 131.2. See also CWA § 303(c)(2)(A), 33 U.S.C. 1313(c)(2)(A) (water quality standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses"). The CWA provides that "[s]uch standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of [the CWA]." 33 U.S.C. 1313(c)(2)(A). Echoing the goals of the Act stated in Section 101,

Section 303(c)(2)(A) also requires a State's water quality standards to take into consideration, for each water body examined, "their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes." 33 U.S.C. 1313(c)(2)(A). Under EPA's regulations, the water quality standards must include "[a]n antidegradation policy" providing generally that the existing uses of the water and the existing quality of the water shall be maintained and protected. 40 C.F.R. 131.6(d), 131.12(a). See CWA § 303(d)(4)(B), 33 U.S.C. 1313(d)(4)(B).

Each State must submit its water quality standards to EPA for review and approval. Upon approval by EPA, a state-adopted water quality standard "shall thereafter be the water quality standard for the applicable waters of that State." CWA § 303(c)(3), 33 U.S.C. 1313(c)(3).

2. This case involves the proposed Elkhorn Hydroelectric Project. Petitioners plan to build the project on the Dosewallips River, which drains western Washington's Olympic Peninsula. The River "flows east through the Olympic National Park, a national wilderness area, national forest land, and then private land before it empties into Hood Canal." Pet. App. 4a. The facility would be built just outside the Olympic National Park, *ibid.*, and we are informed by the United States Forest Service that it would be located on federally owned land within Olympic National Forest. Petitioners propose to operate the facility by diverting water from a 1.2-mile reach of the River (the bypass reach), running the water through turbines and then returning the water to the River. *Ibid.* Currently, the natural flows in this reach of the River are "essentially undiminished by

appropriation." Pet. App. 31a.¹ The River supports three species of anadromous fish: steelhead, and Coho and Chinook salmon. *Id.* at 32.

3. Petitioners filed their application for the Elkhorn project with FERC on March 18, 1986. Section 401(a) of the CWA, 33 U.S.C. 1341(a), requires an applicant for a license or permit for an activity that may result in a discharge into navigable waters to obtain a certification from the State where the discharge will occur. The certification must state that "any * * * discharge" into navigable waters that results from the project "will comply with the applicable provisions of [33 U.S.C.] 1311, 1312, 1313, 1316, and 1317." Under Section 401(d) of the CWA, the state certification must set forth such limitations as will "assure that [the] applicant for a Federal license or permit will comply with any applicable * * * limitations * * * under [Section 301]" of the CWA "and with any other appropriate requirement of State law." 33 U.S.C. 1341(d). Accordingly, before FERC could act, petitioners had to obtain a Section 401 certification from the State of Washington.

Petitioners consulted with a number of state and federal fisheries, wildlife, and environmental agencies, including Washington's Department of Ecology (Ecology), as well as affected Indian tribes. In cooperation with the agencies and tribes, petitioners undertook a study of instream flow conditions on the Dosewallips. Based on that study, petitioners proposed minimum flows for the Elkhorn project's bypass reach of between 65 and 155 cfs (*i.e.*, cubic feet per second), depending on the season. Currently, the

¹ There is nothing in the record to suggest that petitioners have obtained the right to use the water necessary for the project.

stream flow in that portion of the river ranges between 149 cfs and 738 cfs. Pet. App. 51a.

4. On June 11, 1986, Ecology issued a Section 401 water quality certificate imposing a number of conditions on the Elkhorn project. As relevant here, Ecology imposed a minimum stream-flow requirement of between 100 and 200 cfs, depending on the season. A state appeals board, however, determined that the minimum flow requirement was intended to enhance, not merely maintain, the Dosewallips fishery and that the flow regime therefore exceeded Ecology's authority under state law. Pet. App. 55a-57a.

6. Both petitioners and Ecology appealed to the state Superior Court. In an unpublished opinion issued on May 8, 1991, the Superior Court concluded that Ecology was empowered by CWA Section 401 to require petitioners to comply with Ecology's minimum flow regime. Pet. App. 29a-36a, 37a-45a. The Superior Court also concluded that Ecology had imposed the minimum flow requirement merely to protect the Dosewallips fishery, not to improve it, and that, in any event, Ecology was empowered under state law to impose conditions that improve, rather than merely maintain, water resources.

7. Petitioners appealed to the Washington Supreme Court. That court sustained Ecology's imposition of the minimum flow requirement under Section 401. Pet. App. 3a-28a. It found that the antidegradation provisions of the State's water quality standards required the imposition of the minimum flows. The court stated:

[CWA S]ection 401 requires states to certify compliance with state water quality standards. Washington's standards prohibit the degradation of the state's waters, and prohibit the degradation of fish habitat and spawning in the Dose-

wallips in particular. Therefore, section 401 required Ecology to certify that the Elkhorn project would not degrade fish habitat and spawning in the Dosewallips. Given that Ecology's fisheries biologists determined that the instream flows urged by [petitioners] risked such degradation, Ecology therefore could not issue the 401 certificate without imposing more protective instream flow conditions. Absent such a condition, Ecology could not assure compliance with state water quality standards.

Pet. App. 7a-8a.

The court also upheld the condition under CWA Section 401(d), which allows States to impose conditions based upon several enumerated sections of the CWA and "any other appropriate requirement of state law." 33 U.S.C. 1341(d). The court rejected petitioners' argument that the phrase "any other appropriate requirement of State law" was intended to include only water quality standards under CWA § 303, 33 U.S.C. 1313. Pet. App. 13a. The court referred to the express goals of the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a). Relying on "[t]his broad purpose," Pet. App. 11a, the court read Section 401(d) to confer on the States a broad power to "consider all state action related to water quality in imposing standards on section 401 certificates." Pet. App. 13a.

In addition, the court rejected the argument that allowing states to impose minimum flow requirements under Section 401 of the CWA is contrary to *California v. FERC*, 495 U.S. 490 (1990), in which this Court held that the California State Water Resources Control Board had no authority to impose minimum flow-requirements on projects licensed under the FPA. The Washington Supreme Court concluded that Sec-

tion 401 constitutes an independent grant of state power in the otherwise comprehensive scheme of federal regulation under the FPA. Pet. App. 20a-21a.

SUMMARY OF ARGUMENT

Under Section 401(a)(1) of the CWA, an applicant for a federal license—including a license from FERC to construct and operate a hydropower facility—that “may result in any discharge into the navigable waters” shall obtain a certification from the State involved “that any such discharge will comply” with designated provisions of the CWA. 33 U.S.C. 1341(a)(1). Such a certification under Section 401(d) of the Clean Water Act must set forth such limitations as will “assure that [the] applicant for a Federal license or permit will comply with any applicable * * * limitations * * * under [Section 301]” of the CWA “and with any other appropriate requirement of State law.” 33 U.S.C. 1341(d).

In this case, the State issued petitioners a Section 401 certification, but included in the certification a requirement that petitioners maintain a minimum stream flow once their project is built. The question presented in this case is whether the minimum flow condition imposed by the State is a valid Section 401(d) condition, *i.e.*, whether it is necessary to assure compliance with “any applicable * * * limitations * * * under section [301]” of the CWA “and with any other appropriate requirement of State law.”

The Washington Supreme Court’s decision should be affirmed. Even if, as petitioners argue, a State may impose a condition under Section 401(d) only to assure compliance of a “discharge” (a term used in Section 401(a)(1), but not Section 401(d)) with the State’s EPA-approved water quality standards,

petitioners’ project would cause two distinct discharges: the discharge of fill and construction material into the water to construct the dam and the discharge of water over or through the dam once it is built. Both discharges could reasonably be said to result in the problem the State identified: the lack of water in the bypass reach of the Dosewallips River that threatens the use of the river as a fish habitat. Thus, both discharges could reasonably be said to cause a violation of the State’s water quality standards.

Petitioners also contend that the minimum flow condition is not necessary to assure compliance with the State’s water quality standards, since no specific numerical criterion in those standards would be violated by the failure to maintain the minimum flow sought by the State. That contention is mistaken. The Washington Supreme Court relied on the designated and existing use of the Dosewallips River as fish habitat and on the State’s antidegradation policy. It is undisputed that designated uses are a component of state water quality standards, and the State therefore had authority to impose a minimum flow condition to assure that petitioners’ project would not be inconsistent with the use of the Dosewallips River as fish habitat. In addition, Congress, the EPA, and this Court have long recognized that anti-degradation policies are also an integral part of state water quality standards. Those policies assure that waters and their existing uses are not degraded. There is no reason why such policies may not be used, as here, to assure that an existing use of a body of water is not degraded, regardless of whether specific applicable water quality criteria are satisfied.

Petitioners' project also requires licensing by FERC. The Federal Power Act requires FERC, in consultation with other resource agencies, to make a number of determinations concerning the conditions under which petitioners must operate their project, including how best to protect the fish habitat in the Dosewallips River. Since FERC has not yet acted on petitioners' license application, there is no way to know whether any determination that FERC might make concerning petitioners' project would pose any conflict with the conditions imposed by the State in the Section 401 certification at issue in this case. Accordingly, this case does not present any question concerning the effect of the Section 401 conditions imposed by the State on any determination FERC must make in FPA licensing proceedings. In particular, since the basis of any conflict between a hypothetical FERC licensing decision and the Section 401 certification cannot be known, it would be inappropriate in this case to attempt to determine how any such hypothetical conflict should be resolved.

ARGUMENT

I. THE DECISION OF THE WASHINGTON SUPREME COURT SHOULD BE AFFIRMED BECAUSE THE INSTREAM FLOW CONDITION IMPOSED BY THE STATE IN THIS CASE IS A VALID SECTION 401(d) CONDITION

Petitioners contend (Br. 21-30) that the minimum flow condition imposed by the State falls outside the scope of Section 401 because the condition does not address a "discharge." That contention is mistaken. Even if a condition imposed under Section 401(d) were valid only if it assured that a "discharge" will comply with the State's water quality standards, the Section 401(d) condition imposed by the State in this case satisfies that test.

A. The State's Section 401(d) Minimum Flow Condition Addresses The Compliance Of A Discharge With Applicable Provisions Of The CWA

1. Section 401(a)(1) of the CWA requires an applicant for a hydropower license to obtain a state certificate that "any * * * discharge" into navigable waters that results from the project "will comply with the applicable provisions of [33 U.S.C.] 1311, 1312, 1313, 1316, and 1317." 33 U.S.C. 1341(a). In this case, the State granted petitioners a certification under Section 401(a). But the State also imposed conditions on that certification pursuant to Section 401(d) of the CWA, 33 U.S.C. 1341(d). That provision does not use the term "discharge," as does Section 401(a)(1), but instead provides that a Section 401 certification "shall set forth any * * * limitations * * * necessary to assure that any applicant * * * will comply" with certain provisions of the CWA or "any other appropriate requirement of State law."

The question presented in this case is whether the State's minimum flow requirement is a valid Section 401(d) condition. All parties appear to agree on the following proposition: the State's minimum flow requirement is a valid Section 401(d) condition if it is necessary to assure that discharges resulting from the project will comply with applicable provisions of the CWA or "any other appropriate requirement of State law." See, *e.g.*, Pet. Br. 26. In our view, the State's minimum flow condition satisfies that standard.²

2. Petitioners argue (Pet. Br. 21-30) that the minimum streamflow condition in this case is not a valid Section 401(d) condition because no discharges that result from their project would violate applicable CWA provisions or other appropriate requirements of state law. Two distinct discharges, however, that would violate the CWA result from petitioner's facility.

a. The first discharge caused by this project is the actual construction of the dam itself. Section 401(a) specifically recognizes that state certification is necessary for "any activity including, but not limited to, the *construction* or operation of facilities." 33 U.S.C. 1341(a)(1) (emphasis added). As petitioners acknowledge (Pet. Br. 28), the materials from which the dam is to be constructed must be "discharged" into the river to build the dam. Indeed, Section 404 of the

² It is therefore unnecessary to determine in this case whether Congress intended by the use of the term "applicant," rather than "discharge," in Section 401(d) to grant States a broader power to condition certifications under Section 401(d) than to deny them under Section 401(a) and, if so, whether there are limitations on the States' authority to impose such conditions.

Clean Water Act requires petitioners to obtain a federal permit for that initial construction activity.³

If an effect of a discharge would violate the State's Section 303 water quality standards, a State may refuse to certify that the "discharge will comply with the applicable provisions of [Section 303 of the CWA]," 33 U.S.C. 1341(a)(1), or may condition its certification to ensure such compliance. For example, discharge of a particular material into a river that would be harmless in itself could, when combined with materials already in the river, produce pollutants that would violate a State's water quality standards. In this case, the effect of the discharge of the construction materials will be to complete a diversion structure that, it is alleged, will cause or contribute to a violation of state water quality standards. In those circumstances, the State could surely find that the discharge of the material would not comply with the State's water quality standards.

Moreover, the inference that operation of a facility is an effect of the construction of that facility is specifically embodied in the CWA itself. Under Section 401(a)(3), 33 U.S.C. 1341(a)(3), the certification provided by a State for construction of a facility satisfies the certification requirement for operation of the facility unless there are changes either in the facility's operation, the State's water quality standards, or the characteristics of the water. As EPA has explained in guidance to the States on implementation of Section 401, "because the States' certification of a construction permit or license also op-

³ That federal permit is also subject to state review for compliance with water quality standards under Section 401. See *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 48 (D.C. Cir.), cert. denied, 484 U.S. 816 (1987).

erates as certification for an operating permit, * * * it is imperative for a State review to consider all potential water quality impacts of the project, both direct and indirect, over the life of the project." EPA, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes* 22 (Apr. 1989). EPA's interpretation of Section 401 as including indirect effects of a discharge of construction materials is entitled to deference. *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In sum, if the operation of the dam would violate the applicable provisions of the CWA, the violation is an indirect effect of the discharge of material to build the dam. Accordingly, the State may impose a condition in a Section 401 certificate to assure that the discharge of fill and construction materials does not result in lack of compliance with the CWA when the dam is in operation.

b. A second "discharge" is found at the point where the water not needed to run the turbines is released at the dam itself. Petitioners contend (Pet. Br. 25) that this release of water is not a "discharge," but is a "modification" of the stream-flow not subject to the provisions of Section 401. However, as petitioners later note (Pet. Br. 28 n.20), "dams * * * contain other mechanisms for releasing water into the stream below, including such devices as crest-gates, sluice-gates and release valves that may be used to reduce pressure behind the dam, to spill water over the top during high water or to allow for maintenance on the turbine facility." Thus, when the operator of the dam releases water through a crest-gate, sluice-gate,

release valve, or other similar device, it has caused a discharge within the meaning of Section 401.⁴

It is that discharge that the State here has conditioned in its water quality certification. Once again, if that discharge would result in a failure to comply with the applicable CWA provisions, the State may

⁴ We note that Sections 301 and 402 of the Act require a permit for the "discharge of any pollutant," i.e., for the addition of any pollutant to a water of the United States from a point source. See CWA § 502(12), 33 U.S.C. 1362(12) (defining "discharge of a pollutant"). We do not suggest here, however, that the term "discharge" in those two Sections extends to activities which do not involve either a "pollutant" or an "addition" of a pollutant to navigable waters. See *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988); *United States v. Tennessee Water Quality Control Bd.*, 717 F.2d 992, 997-998 (6th Cir. 1983), cert. denied, 466 U.S. 937 (1984); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *Missouri v. Department of Army*, 672 F.2d 1297, 1304 (8th Cir. 1982). Indeed, Congress employed the term "discharge" when used without qualification (as in Section 401(a)) more broadly than the term "discharge of any pollutant," which is used in a number of other provisions of the CWA. See, e.g. 33 U.S.C. 1311(a), 1311(h), 1312, 1316(a) (1), 1323(a), 1342(a) (1). See CWA § 502(16), 33 U.S.C. 1362(16) ("The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.") (emphasis added).

Petitioners cite (Pet. Br. 29-30) the two *National Wildlife Federation* cases for the proposition that hydropower structures do not cause a "discharge" that may be addressed under Section 401. Those cases, however, involve the scope of the term "discharge of any pollutant" under Section 402, 33 U.S.C. 1342. As discussed above, the term "discharge" as used in Section 401(a) is broader than "discharge of any pollutant." For that reason, even petitioners do not appear to adopt Amicus Niagara Mohawk Power Corporation's argument (Amicus Br. 11) that a Section 401(d) condition is valid only if it regulates discharges "of pollutants." See Pet. Br. 22 (specification of "discharge" to "include" a discharge of a pollutant is "not actually definitional").

impose conditions on a certification to assure that it does not.

B. The Washington Supreme Court Appropriately Found That The Minimum Flow Condition Was Necessary To Assure That Petitioners' Hydropower Project Would Comply With Applicable CWA Provisions

1. The Washington Supreme Court found that operation of petitioners' hydropower project would violate the CWA because it would cause a violation of the water quality standards promulgated by the State and approved by EPA under CWA § 303, 33 U.S.C. 1313. In particular, the court found that the State's water quality standards included designated uses for the water (in this case, as fish habitat), and an antidegradation policy requiring that existing uses (including use as fish habitat) be maintained.⁵ The court also found that the minimum flow condition to be imposed in the bypass reach was necessary to assure that the river could continue to be used as fish habitat. Accordingly, the court found that the minimum flow condition was a valid Section 401 condition—i.e., it was necessary to assure that the operation of the project would comply with state water quality standards. Pet. App. 7a-8a.

It is undisputed that a State may impose Section 401(d) conditions on a certificate in order to assure compliance with state water quality standards duly promulgated under Section 303 of the Clean Water Act, 33 U.S.C. 1313. See, e.g., Pet. App. 7a; Pet. Br. 31. Although Section 401(d) does not expressly refer

⁵ Washington State's policy provides that "[e]xisting beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." Wash. Admin. Code 173-201-035(8) (a) (1990); see Pet. App. 7a.

to Section 303, at least two independent statutory sources establish that a State may include conditions in a Section 401 certification necessary to assure compliance with Section 303. Section 401(d) itself permits States to include conditions necessary to assure compliance with "any other appropriate requirement of State law." Regardless of what else that phrase connotes,⁶ it certainly includes state water quality standards duly promulgated by the State and approved by EPA under Section 303. In addition, Section 401(d) permits States to include conditions necessary to assure compliance with Section 301, 33 U.S.C. 1311. As petitioners note (Pet. Br. 44), Section 301 expressly incorporates, through Section 301(b)(1)(C), 33 U.S.C. 1311(b)(1)(C), water quality standards under Section 303.⁷ Accordingly,

⁶ Since the decision of the Washington Supreme Court can be affirmed on the apparently undisputed premise that "any other appropriate requirement of State law" refers to state water quality standards, it is not necessary to reach the question of what *other* requirements of state law, if any, are included within the meaning of that phrase. Compare Pet. App. 10a, 13a. Compare *Central Maine Power Co.*, 52 F.E.R.C. ¶ 61,033 (1990) (discussing Maine's imposition of conditions concerning recreation facilities); *Allegheny Electric Coop.*, 51 F.E.R.C. ¶ 61,268, at 61,846 n.169 (1990) (discussing West Virginia's imposition of conditions related to recreation and consultation).

⁷ Section 301(b)(1)(C) states that "there shall be achieved" by a certain date "any more stringent limitation, including those necessary to meet *water quality standards* * * *, established pursuant to any State law or regulations * * *, or required to implement any applicable *water quality standard* established pursuant to [the CWA]." 33 U.S.C. 1311(b)(1)(C) (emphasis added).

When Congress added the reference to Section 303 in Section 401(a) in 1977, Congress explained that "[t]he inclusion of section 303 is intended to clarify the requirements of section 401" and that "Section 303 is always included by refer-

when Section 401(d) permits States to condition their certifications to assure compliance with Section 301, it thereby permits States similarly to condition their certifications to assure compliance with water quality standards adopted pursuant to Section 303.

2. Petitioners complain (Pet. Br. 33-37) that the State's application of its designated uses and its antidegradation policy to protect a designated and existing use of the waters as fish habitat was improper, because the CWA depends solely on "objective criteria" to maintain and enhance water quality.

Petitioners' contention is mistaken. Water quality criteria can be, and frequently are, expressed in narrative terms, such as "there shall be no discharge of toxic pollutants in toxic amounts." See *American Paper Institute, Inc. v. EPA*, 996 F.2d 346 (D.C. Cir. 1993). EPA has frequently translated such narrative criteria into specific requirements in Section 402 permits. See *American Paper Institute*, 996 F.2d at 350-353; *Champion Int'l Corp. v. EPA*, 850 F.2d 182, 184 (4th Cir. 1988). There is no reason

ence where section 301 is listed." H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), reprinted in Congressional Research Service, *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act*, Vol. III, at 280 (1978).

Indeed, the failure specifically to enumerate Section 303 in Section 401(d) is an artifact of the way Congress amended the statute in 1977. The 1977 amendments provide that "Section 401 * * * is amended by inserting '303,' after '302' in the phrase 'sections 301, 302, 306, and 307 of this Act,' and in the phrase 'section 301, 302, 306, or 307 of this Act,' each time these phrases appear." Clean Water Act of 1977, Pub. L. No. 95-217, § 64, 91 Stat. 1599. Section 401(d) included descriptions of Sections 301, 302, 306, and 307, rather than simply listing those sections, as did Section 401(a)(1). Accordingly, although the word "303" was added to the list in Section 401(a)(1), the amendments did not expressly add the word "303" to Section 401(d).

why antidegradation policies, which are highly analogous to such narrative water quality criteria, should be treated differently.⁸

3. Petitioners also argue (Pet. Br. 35-36) that antidegradation requirements cannot be an independent, enforceable component of state water quality standards. Section 303(a)(1) of the CWA, 33 U.S.C. 1313(a)(1), provides that state water quality standards in existence at the time of the 1972 amendments to the CWA were generally to remain in effect and could be modified only as deemed necessary through the triennial review process outlined in Section 303(c), 33 U.S.C. 1313(c). At the time of the enact-

⁸ Petitioners draw an artificial distinction between what they term "water quantity" and "water quality" issues, and argue that water quantity can never affect water quality—apparently even when a lowering of the volume of the water in a river would entirely destroy all of its uses. See Pet. Br. 37-42. In support of that implausible contention, they argue (Pet. Br. 37) that "[w]ater quantity issues are excluded from the CWA by §§ 101(g) and 510(2) [of the CWA]." Section 101(g) provides that "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA]" and that "nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. 1251(g). Section 510(2) provides that "nothing in this chapter shall * * * be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters * * * of such States." 33 U.S.C. 1370(2). Those provisions thus generally preserve to each State the authority to determine who has the right to various quantities of water within its jurisdiction. *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985). Nothing that has happened in this case would alter the State's authority in that regard. Indeed, nothing in the record suggests that the State has yet allocated water rights for the project. Accordingly, Sections 101(g) and 510(2) have no bearing on this case.

ment of the 1972 amendments, the water quality standards of all 50 States included antidegradation provisions. See Hines, *A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water*, 62 Iowa L. Rev. 643, 658-660 (1977). By providing that existing water quality standards were to remain in effect, Congress in 1972 recognized that the antidegradation provisions then in effect retained legal force.⁹

The consistent regulatory construction of Section 303 over the past twenty years establishes that an antidegradation policy is an integral part of a State's water quality standards. EPA has continuously required by regulation that state water quality standards must include an antidegradation policy in order to receive EPA approval, see 40 C.F.R. 131.6(d), and has specified the required content of such a policy, see 40 C.F.R. 131.12.¹⁰ Indeed, in an amendment to Section 303 passed in 1987, Congress specifically recognized that antidegradation policies were an essential part of water quality standards. The amendment

⁹ There were numerous indications of Congress's approval of the antidegradation concept in the legislative history. See, e.g., H.R. Rep. No. 911, 92d Cong., 2d Sess. 20 (1972), reprinted in 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972* (CWA Leg. Hist.), 93d Cong., 1st Sess. 772 (Comm. Print 1973); S. Rep. No. 414, 92d Cong., 1st Sess. 19-20 (1971), reprinted in 2 CWA Leg. Hist. 1437-1438. See also CWA § 101(a), 33 U.S.C. 1251(a) ("The objective of [the CWA] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.") (emphasis added).

¹⁰ Precursors of the current regulations can be found at 40 C.F.R. 130.22(a) (1974); 40 C.F.R. 130.17(e) (1976); 40 C.F.R. 35.1550(e) (1979).

provided that "any effluent limitation * * * established under this section * * * may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section." 33 U.S.C. 1313(d)(4)(B) (emphasis added).

Finally, this Court has recognized that a State's antidegradation policy is an integral, legally enforceable component of a State's Section 303 water quality standards and that application of that policy may determine whether a particular activity complies with those standards. In *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992), the primary contention was that permitting a particular discharge would, in the Court's terms, "violate[] the [state] water quality standards," which provide that "'no degradation * * * shall be allowed' [in the body of water at issue]." *Id.* at 1051. The Court then considered whether EPA's application of the State's antidegradation provision was appropriate. In the course of doing so, the Court repeatedly referred to the antidegradation policy as a part of the State's water quality standards, see *id.* at 1058 n.13, 1059, and applied the policy as a legally enforceable requirement under the CWA.

4. The State also justified the Section 401(d) condition in this case as necessary to protect the River's designated use. Under Section 303(c)(2)(A) of the CWA, new or revised water quality standards "shall consist of the designated uses * * * and the water quality criteria." 33 U.S.C. 1313(c)(2)(A). Petitioners seize on that language to argue (Pet. Br. 31-35) that a State may not impose a Section 401(d) condition to protect a designated use, but may do so only to enforce specific water quality criteria. According to petitioners, the State's attempt to protect a designated use "improperly treats 'and' [in Section 303(c)(2)(A)] as if it meant 'or'" (Pet. Br. 32) by

imposing a condition to protect a designated use where no specific water quality criterion is applicable.

Petitioners' argument is based on a misreading of the statutory language. Petitioners agree that a State may impose a Section 401(d) condition to assure compliance with state water quality standards. By the literal terms of Section 303(c)(2)(A), water quality standards consist of "designated uses * * * and * * * water quality criteria." If a new project would be inconsistent with a designated use, the fact that it might comply with the State's water quality criteria would thus be irrelevant. Its inconsistency with the designated use would alone be sufficient to establish, under the literal terms of the statute, that it did not comply with the designated use *and* the water quality criteria, *i.e.*, with applicable water quality standards. Since failure to achieve the minimum flow requirement would be inconsistent with the designated use of the Dosewallips River as fish habitat, imposing the minimum flow requirement is necessary to achieve compliance with applicable water quality standards.

II. THIS CASE PRESENTS NO QUESTION CONCERNING THE EFFECT OF THE STATE'S SECTION 401(d) CERTIFICATION CONDITIONS ON THE FPA LICENSE, IF ANY, THAT FERC ULTIMATELY DECIDES TO ISSUE FOR PETITIONERS' PROJECT

For reasons explained above, we believe that respondents' Section 401(d) certification was valid, and the decision of the Washington Supreme Court therefore should be affirmed. Petitioners argue, however, that our interpretation of the Clean Water Act should be rejected because it would create a conflict between the State's authority under Section 401(d) and various powers granted to FERC under the Federal Power Act (FPA). In particular, petitioners and

their amici argue that the FPA authorizes FERC to determine minimum instream flows, and that the CWA therefore ought not be interpreted to permit the States a similar authority under Section 401.

In our view, there is no conflict at this time between the powers granted FERC by the FPA and the powers granted the State of Washington by the CWA. Under Section 10(j) of the FPA, 16 U.S.C. 803(j), FERC must include in a hydropower license conditions "to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project." If and when FERC determines for specific reasons that a stream-flow different from that imposed by the State is required by the FPA, the effect of that determination—and the consequent reconciliation of the Federal Power Act and the Clean Water Act—will be ripe for consideration by FERC and on a petition for review in federal court of any such FERC decision. In short, in its present posture, this case does not present any question concerning the effect of the State's Section 401(d) certification conditions on various decisions FERC must make in determining whether and under what conditions to license the project under the FPA.

1. Part I of the FPA was originally enacted as the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063, and constitutes "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180 (1946). The purpose of the statute was to centralize authority over hydropower projects, which commonly involve bodies of water that flow through, affect, or border a number of States, in a single federal agency—first, the Federal Power Commission,

now FERC. See *id.* at 174. The FPA requires any party constructing a hydroelectric project that is on navigable waters or federal lands or that will affect interstate commerce, to obtain a license from FERC. FPA § 4(e), 16 U.S.C. 797(e). In deciding whether to issue such a license, FERC must, "in addition to the power and development purposes for which licenses are issued, * * * give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." *Ibid.* See also *Udall v. FPC*, 387 U.S. 428 (1967). Section 10(a) of the FPA gives FERC the power to impose conditions in a license so that the project is "best adapted to a comprehensive plan for improving or developing a waterway," which specifically includes protection and enhancement of fish habitat as well as other beneficial public uses. 16 U.S.C. 803(a).

To be sure, the statute does impose limits on FERC's authority. See, e.g., *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984) (discussing requirement in 16 U.S.C. 797(e) that hydropower license for project within federal reservation must contain conditions determined necessary by responsible cabinet officer); 16 U.S.C. 823a(c) (FERC exemption from licensing for a hydropower project of 15 megawatts or less using a manmade conduit must contain conditions deemed appropriate by relevant federal or state fish and wildlife agency). One of those limits is found in Section 10(j) of the FPA. Under that provision, which was enacted as part of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243, each license must include conditions "to adequately and

equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project." 16 U.S.C. 803(j)(1). Such conditions shall be based on recommendations from the National Marine Fisheries Service, the Fish and Wildlife Service, and state fish and wildlife agencies. *Ibid.* If FERC finds that such a recommendation is "inconsistent with the purposes and requirements" of the FPA, it must attempt to resolve any such inconsistency, giving "due weight to the recommendations, expertise, and statutory responsibilities" of the recommending agency. 16 U.S.C. 803(j)(2). Finally, if no reconciliation is possible and FERC fails to adopt such a recommendation "in whole or in part," it must both explain why the agency's recommendation is inconsistent with the FPA, 16 U.S.C. 803(j)(2)(A), and find "that the conditions selected by the Commission comply with" the requirement to protect, mitigate damages to, and enhance, fish and wildlife affected by operation of the project, 16 U.S.C. 803(j)(2)(B). Cf. *United States Dep't of Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992); *National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1480 (D.C. Cir. 1990).

In *California v. FERC*, 495 U.S. 490 (1990), this Court considered the scope of FERC's authority under the FPA to set stream-flow conditions.¹¹ The Court reaffirmed the holding of *First Iowa* that, aside from instances where authority was "'saved' to the States" by specific FPA provisions, Congress intended "to let the supersedure of the state laws by federal legislation take its natural course." 495 U.S. at 498.

¹¹ Since the State in *California v. FERC* had not attempted to impose a condition in its Section 401 certification, this Court had no occasion to consider the application of the Clean Water Act in that case.

In *First Iowa*, that principle led the Court to hold that the FPC had the responsibility to set minimum stream flows. In *California v. FERC*, the Court reached the same conclusion, specifically noting that "Congress has amended the FPA [in the ECPA amendments] to elaborate and reaffirm *First Iowa's* understanding that the FPA establishes a broad and paramount federal regulatory role." 495 U.S. at 499.

2. This case does not present any question concerning whether and under what circumstances a determination by FERC under the FPA concerning appropriate stream-flow conditions could have an effect on different stream-flow conditions imposed by the State in a Section 401 certification. It is common ground that Section 401(d) of the CWA grants the States authority to require that hydropower projects (or at least the discharges resulting from such projects) comply with various provisions of the CWA, including (at least) state water quality criteria. Where a State imposes a Section 401(d) condition to assure compliance with such criteria, that condition necessarily becomes part of the FERC-issued federal license. Similarly, it is clear that the FPA authorizes—indeed, requires—FERC to impose license conditions of various sorts for protection of fish habitats. The disputed point is the relatively narrow question of whether a State may impose a stream-flow condition under Section 401 that is required not to enforce a State's numerical water quality criteria, but to protect the designated and existing use of the body of water from degradation.

For the reasons we have given above, in our view a State generally does have authority to impose a stream-flow condition in the above circumstances. But that authority may have limitations in the context of FPA licensing of a hydroelectric facility. In particular, a case could arise where FERC has determined

that a particular instream flow is required by the FPA, and where that flow is different from the minimum flow condition imposed by the State. In that case, a question would be presented concerning how to harmonize the competing regulatory schemes.

That question could be answered in a variety of ways. It is possible that, in such circumstances, the state minimum flow condition would prevail, since CWA Section 401(d) unequivocally states that conditions included in the Section 401 certificate "shall become a condition on" the federal license. 33 U.S.C. 1341(d). It could be argued, on the basis of that statutory language, that federal licensing authorities such as FERC have no authority to avoid the State's conditions. It also could be argued, however, that in such circumstances FERC's stream-flow condition would prevail, in light of the FPA's grant of authority to FERC over just such matters. Indeed, it could be argued that the FPA in effect gives FERC authority to balance the various possible uses of the body of water and that FERC's resulting determination is in effect a designation of the appropriate use of the body of water for hydropower licensing purposes. If that were so, FERC's determination would disable the State from relying on its own designated use to impose its condition.¹²

3. For present purposes, the crucial point is that this case does not present any question concerning the effect of a hypothetical FERC determination that disagreed with the State's stream-flow condition. In our view, it would be inappropriate to use this case as a vehicle to resolve such a hypothetical conflict.

¹² Cf. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992); *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 (1989); *United States v. Fausto*, 484 U.S. 439, 453 (1988).

First, since FERC has not yet acted on petitioners' license application, it is possible that FERC will deny petitioners a license altogether. If so, that would render moot any dispute concerning conditions imposed by the State's Section 401 certification.¹³

Second, even if FERC were to decide to issue petitioners a license, it is doubtful whether any conflict between FERC and the State would develop. Under the FPA, FERC is obligated to "give equal consideration to" the protection of fish habitat when determining whether to issue a license for a hydropower project. FERC is also obligated to impose such conditions (including minimum flow conditions) as are recom-

¹³ Indeed, petitioners' application must overcome several obstacles in order to obtain approval as proposed. The land management plans for the Olympic National Forest, in which petitioners' project would be built, are currently being re-evaluated due to the litigation involving the northern spotted owl in the Pacific Northwest. See *Seattle Audubon Society v. Espy*, 998 F.2d 699 (9th Cir. 1993). Under the preferred alternative proposed in the Draft Supplemental Environmental Impact Statement published in July 1993, the area around the Dosewallips River would be considered a Tier I key watershed. Pending completion of a watershed analysis, the plan calls for creation of a Riparian Reserve of at least 300 feet on each side of the river. Special management guidelines are to apply in such areas, i.e., they "prohibit activities not designed specifically to maintain and restore the structure and function of the reserve and benefit fish habitat." Draft SEIS at 2-16. Moreover, the draft land management plan includes guidelines calling for "in-stream flows and habitat conditions that maintain or restore riparian resources." Draft SEIS at B-87.

The Environmental Impact Statement is scheduled to be completed in February 1994; final decisions amending the National Forest Plans involved are expected in March 1994. If the proposed plans are made final, it would be doubtful whether FERC, which must ensure that a hydropower license "will not interfere or be inconsistent with the purpose for which [the national forest] was created," 16 U.S.C. 797(e), could issue a license for petitioners' project.

mended by Washington's wildlife agency to protect and enhance the fish habitat, unless FERC determines that such conditions are inconsistent with the FPA. Even where FERC finds such an inconsistency, FERC must nonetheless impose other conditions that are consistent with the FPA to protect and enhance the fish habitat. In light of those standards, it may well be that FERC will not reach a different conclusion from that reached by the State concerning the minimum flow requirements to be imposed on petitioners' project.

Third, even if it were likely that a conflict would develop between FERC's determination under the FPA of what protections should be afforded fish habitat and the State's minimum flow conditions, it would be inappropriate to anticipate that conflict and seek to resolve it in this case. If FERC finds that the State's condition is inconsistent with conditions FERC must impose pursuant to the Federal Power Act, it can either attempt to refuse to include the State's conditions in a license it grants or it can include the conditions, but present its own views concerning their legal status. In either event, FERC's determination can be tested on judicial review of FERC's licensing decision, based on a full administrative record and a concrete controversy. Compare *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-779 (1984).

CONCLUSION

The Court should affirm the judgment of the Washington Supreme Court.

Respectfully submitted.

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DECEMBER 1993

APPENDIX

1. Section 101 of the Clean Water Act, 33 U.S.C. 1251, provides in relevant part:

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(1a)

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * * *

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter challed "Administrator") shall administer this chapter.

* * * *

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

2. Section 303 of the Clean Water Act, 33 U.S.C. 1313, provides in relevant part:

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to

October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3) (A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws

water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be

consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and

other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a state reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he

shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter. The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) **Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision**

* * * * *

(4) **Limitations on revision of certain effluent limitations.—**

(A) **Standard not attained.**—For waters identified under paragraph (1)(A) where the ap-

plicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) **Standard attained.**—For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

3. Section 401 of the Clean Water Act, 33 U.S.C. 1341, provides in relevant part:

§ 1341. Certification

(a) **Compliance with applicable requirements; application; procedures; license suspension**

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the

navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, inter-

state agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect

to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a

certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where

actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provisions of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting

through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard or performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

4. Section 502 of the Clean Water Act, 33 U.S.C. 1362, provides in relevant part:

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical

wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

* * * * *

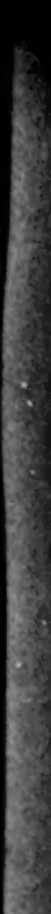
(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * * * *

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.



No. 92-1911

Supreme Court, U.S.

FILED

NOV 15 1993

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

PUD No. 1 of JEFFERSON COUNTY
AND THE CITY OF TACOMA,

Petitioners,
v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE,
Respondents.

On Writ of Certiorari to the Supreme Court
of the State of Washington

BRIEF OF AMICUS CURIAE
NORTHWEST HYDROELECTRIC ASSOCIATION
IN SUPPORT OF PETITIONERS

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OCTOBER TERM, 1993

No. 92-1911

PUD No. 1 OF JEFFERSON COUNTY
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v. *Petitioners,*

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE,
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On Writ of Certiorari to the Supreme Court
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BRIEF OF AMICUS CURIAE
NORTHWEST HYDROELECTRIC ASSOCIATION
IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Amicus Curiae, Northwest Hydroelectric Association (NWhA), is the trade association of the Pacific Northwest hydroelectric industry.¹ Its members include publicly-owned and investor-owned utilities, municipalities, a Native American tribe and independent power producers

¹ Both Petitioners and Respondents have consented to NWhA filing a brief amicus curiae. Letters from counsel for Petitioners and Respondents reflecting their consent have been filed with the Court.

located in Idaho, Montana, Northern California, Oregon and Washington.²

NWHA adopts in their entirety the briefs of Petitioners and amici curiae in support of Petitioners. It writes separately to provide the Court with examples of other states that have imposed non-water quality conditions under the guise of § 401 of the Clean Water Act³ and to illustrate the severe impact those unauthorized conditions have on the licensing process.

SUMMARY OF ARGUMENT

Under the Federal Power Act, Congress vested the Federal Energy Regulatory Commission (FERC) with exclusive authority to license hydroelectric projects. Congress specifically required FERC to condition such licenses to protect and enhance fish and wildlife, which includes determining minimum streamflows. States usurp FERC's authority when they impose minimum streamflows under the guise of § 401. What the Washington Department of Ecology did on the Elkhorn project is nothing more than an end run around FERC's exclusive licensing authority.

The State of Washington is not alone in this unauthorized exercise of power. Oregon and Idaho also have erroneously imposed non-water quality conditions on hydroelectric projects as conditions of § 401 certification.

The states' actions burden an already complex and costly licensing process. Hydropower owners, operators and developers spend millions of dollars and several years conducting extensive studies to satisfy the multitude of concerns raised by the states. They engage a variety of experts, including lawyers, economists, accountants, engineers, biologists, environmental and recreational consult-

² A list of the membership of NWHA is included in the attached Appendix.

³ 33 U.S.C. §§ 1251-2623 (1988).

ants and others with no certainty that the state will ever grant certification. Imposing non-water quality conditions on the certification process only injects further uncertainty, increases the expense, adds to the bureaucracy, fosters piecemeal litigation and creates interminable delay. As illustrated in the Benham Falls example below, the process may deplete the developer's finances to the point where it is ultimately forced to abandon the project.

ARGUMENT

I. IMPOSING NON-WATER QUALITY CONDITIONS UNDER THE GUISE OF § 401 CERTIFICATION IS NOTHING MORE THAN AN END RUN AROUND FERC'S EXCLUSIVE AUTHORITY TO LICENSE HYDROELECTRIC PROJECTS.

FERC's authority in the area of licensing hydroelectric projects is exclusive. *California v. FERC*, 495 U.S. 490 (1990). Although states play an important and integral role in the licensing process, they do not *share* this authority with FERC. *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 167-68 (1946). Under § 10(j) of the Federal Power Act, 16 U.S.C. §§ 791-828 (1988) (FPA), fish and wildlife considerations, including minimum streamflows, fall within FERC's "broad and paramount federal regulatory role." *See California v. FERC*, 495 U.S. at 499.

When Congress amended the FPA in 1986,⁴ it specifically required FERC to include fish and wildlife conditions in hydroelectric licenses. Congress created a coordinated regulatory scheme in which state fish and wildlife agencies, along with various other federal agencies, make *recommendations* to FERC regarding the necessary conditions to protect fish habitat. *See* 16 U.S.C. § 803(j)(2). While Congress envisioned that FERC would accord the

⁴ Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243, 16 U.S.C. §§ 797(e), 803(a)(1).

agencies special deference, it nonetheless gave FERC the authority to reject the recommendations when they were inconsistent with the purposes and requirements of Part I of the FPA. *Id.*

In the instant case, the effect of the Washington Department of Ecology's action is to supplant FERC on the issue of the streamflows necessary to protect fish habitat. FERC does not look behind the state water quality agency's determination on § 401 certification.⁵ As are discussed in the briefs of other amici in support of Petitioners, the state's decision must be based on a promulgated water quality standard and not a general public interest criterion at the state's discretion.

II. OTHER STATES ALSO CIRCUMVENT FERC'S EXCLUSIVE AUTHORITY BY IMPOSING NON-WATER QUALITY CONDITIONS ON § 401 CERTIFICATION.

The Elkhorn project is not an isolated example. As illustrated by another amicus curiae, Pacific Northwest Utilities, the Washington Department of Ecology recently imposed minimum streamflow conditions on the water quality certificate for the White River Project. Other states in the Northwest similarly are imposing non-water quality conditions on § 401 certification. In doing so, these states accomplish indirectly what Congress prohibited them from doing directly under the FPA. Two examples

⁵ See *Town of Summerville*, 60 F.E.R.C. ¶ 61,291 at 61,990 (1992) ("since pursuant to § 401(d) of the Clean Water Act all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of the state courts and not the Commission"); *Noah Corporation*, 57 F.E.R.C. ¶ 61,170 at 61,601 (1991) ("we recognize that review of the appropriateness of water quality certification conditions is a matter for state courts to decide"); *Central Maine Power Co.*, 52 F.E.R.C. ¶ 61,033 at 61,172 (1990) ("review of the appropriateness of water quality certification conditions is the purview of the state courts").

of proposed hydroelectric projects in Oregon and Idaho reflect the true situation.

A. Boulder, Empire and Kanaka Rapids Projects.

The developer, L.B. Industries, Inc. (LBI), seeks to construct three relatively small hydroelectric plants along a two to three mile stretch of the Snake River near Bliss, Idaho.

Between June and July, 1992, LBI filed original license applications with FERC for all three projects, which FERC accepted for filing. FERC Nos. 10772, 10849, 10930. In June, 1992, LBI requested § 401 certification from the Idaho Department of Environmental Quality (IDEQ).⁶ IDEQ denied certification one year later, citing as one reason insufficient bypass flows.⁷

LBI spent over \$1.2 million dollars conducting the studies requested by various agencies, including the Environmental Protection Agency, the United States Fish and Wildlife Service (USFWS), the United States Department of Fish and Game and the Army Corps of Engineers. LBI retained the services of preeminent environmental consultants, Dr. Charles Brockway and Mark Hill, to study bypass flows. Although LBI's studies concluded that flows of 900 cubic feet per second (cfs) were the minimum flows necessary to preserve fish habitat, it suggested 1,000 cfs as the minimum flow. USFWS wanted to increase the minimum streamflows to 1,400 cfs. In denying § 401 certification, IDEQ did not impose minimum streamflows.

⁶ For certification purposes, IDEQ and LBI have treated the three projects as one.

⁷ Minimum streamflows are not part of Idaho's Water Quality Standards. See Idaho Adm. Code 16.01.2200, 16.01.2250. IDEQ also denied certification based on the level of dissolved oxygen and LBI's failure to obtain an exemption from the Comprehensive State Water Plan.

Rather, it denied certification on the grounds that the issue had not been resolved between LBI and USFWS.

LBI asked IDEQ to reconsider and supplied IDEQ with additional information to support its position. IDEQ refused, and LBI filed an appeal with the Idaho Board of Health and Welfare on September 7, 1993. That appeal is currently pending. A decision will likely take another year. After that, either party could seek judicial review of the agency's order. No immediate resolution is in sight.

In the meantime, FERC has suspended processing LBI's license application. FERC is unwilling to conduct an environmental assessment or prepare an environmental impact statement without § 401 certification from IDEQ. LBI is not willing to spend more money on environmental studies without some guarantee that it will obtain a water quality certificate from IDEQ. The process is stalemated.

Even assuming LBI could eventually obtain § 401 certification, the process would start over again at FERC. After FERC reinstated the license applications, it would certify the projects were ready for environmental analysis. FERC would either conduct an environmental assessment or prepare an impact statement. LBI would be required to conduct further studies. The same state and federal agencies, plus several more, would revisit the very same issues and concerns currently raised by IDEQ in the certification process. At the end of this process, FERC would conduct a § 10(j) review to determine what conditions should be imposed on the license. LBI estimates that it would take an additional two to three years and perhaps another million dollars to obtain a license from FERC.

B. Benham Falls Project.

In this project, the developers planned to construct a hydroelectric facility on the Deschutes River near Bend in central Oregon. They filed an application with FERC for an original license. As part of the license process, the developers requested § 401 certification from the Oregon Department of Environmental Quality (ODEQ). The ODEQ denied certification because the developers failed to obtain a statement from Deschutes County that the project was compatible with the county's comprehensive land use plan and land use ordinances. The developers appealed ODEQ's denial to the Environmental Quality Commission (EQC). The EQC affirmed the ODEQ. The developers then sought judicial review of the EQC's order denying them § 401 certification.

The Oregon Court of Appeals held that the EQC and the ODEQ could not deny certification for failure to comply with state land use laws.⁸ Only violations of the specific provisions enumerated in § 401(a)(1) or of the state regulations issued thereunder provide the basis to deny a water quality certificate.

In dicta, the court indicated that the ODEQ could consider land use issues in determining what conditions to impose on the water quality certificate under § 401(d). That is precisely what ODEQ did on remand. When ODEQ denied certification a second time, the developers lacked the financial resources to withstand another round of agency and judicial appeals and ultimately abandoned the project.

⁸ The decision of the Oregon Court of Appeals is reported in *Arnold Irrigation Dist. v. DEQ*, 79 Or. App. 136, 717 P.2d 1274, rev. denied, 301 Or. 765 (1986).

C. Through the Guise of § 401(d), States have Distorted the Balance of Authority in the Licensing Process.

Congress never intended to create, nor did it ever envision, the duplicative, lengthy and costly licensing process described in the examples above. This Court recognized the impracticability of such a system in *First Iowa* when it stated that this "dual final authority, with a duplicative system of state permits and federal licenses required for each project, [is] unworkable." 328 U.S. at 169.

The two examples discussed above illustrate that the current process is unworkable. As the Ninth Circuit recently noted, it is the process itself that creates a hardship:

Process costs money. If a federal licensee must spend years attempting to satisfy an elaborate, shifting array of state procedural requirements, then he must borrow a fortune to pay lawyers, economists, accountants, archaeologists, historians, engineers, recreational consultants, environmental consultants, biologists and others, with no revenue, no near-term prospect of revenue, and no certainty that there will ever be revenue. Meanwhile, politics, laws, interest rates, construction costs, and costs of alternatives change.

Sayles Hydro Ass'n v. Maughan, 985 F.2d 451, 453 (9th Cir. 1993).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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November 15, 1993

APPENDIX

APPENDIX

| <u>Name</u> | <u>City</u> | <u>State</u> |
|---------------------------------|---------------|--------------|
| ABB Phoenix Controls | Bothell | WA |
| Alaska Power & Telephone | Port Townsend | WA |
| Central Oregon I.D. | Redmond | OR |
| Chelan PUD | Wenatchee | WA |
| CHI West, Inc. | Boise | ID |
| City of Tacoma/Utility | Tacoma | WA |
| Consolidated Hydro, Inc. | Grenich Plaza | CT |
| Consolidated Pumped Stor. | Greenwich | CT |
| David Evans and Associates | Portland | OR |
| Davis Wright Tremaine | Portland | OR |
| Deschutes Valley Water Dist. | Madras | OR |
| Douglas County PUD | E. Wenatchee | WA |
| EBASCO Services, Inc. | Bellevue | WA |
| EDAW | San Francisco | CA |
| EG&G Idaho, Inc. | Idaho Falls | ID |
| Falls Creek HB Limited P. | Eugene | OR |
| Grant County PUD | Ephrata | WA |
| Harza Northwest, Inc. | Bellevue | WA |
| HCI Publications | Kansas City | MO |
| HDR Engineering, Inc. | Bellevue | WA |
| Hydro West Group, Inc. | Bellevue | WA |
| Hydro Y.E.S. | Ferndale | WA |
| Ida-West Energy | Boise | ID |
| Impsa International, Inc. | Pittsburgh | PA |
| Kvaeme-Hydro Power, Inc. | Stamford | CT |
| Lilliwaup Falls Generating Co. | Seattle | WA |
| Middle Fork Irrigation Dist. | Parkdale | OR |
| National Hydro | Boston | MA |
| Northrop Devine & Tarbell, Inc. | Portland | ME |
| NW Pipe & Casing Co. | Portland | OR |
| NW Power Planning Council | Portland | OR |
| Okanogan County PUD | Okanogan | WA |
| Pacific Hydro Consulting Group | Alameda | CA |
| Pacific Water Works Supply | Seattle | WA |
| PacifiCorp | Portland | OR |
| Pend Oreille County PUD | Newport | WA |
| Portland General Electric | Portland | OR |
| Precision Machine & Supply | Lewiston | ID |

2a

| <u>Name</u> | <u>City</u> | <u>State</u> |
|-----------------------------|--------------|--------------|
| Puget Power | Bellevue | WA |
| R W Beck & Associates | Seattle | WA |
| Ray Toney & Assoc. | Redding | CA |
| Resource Management | Portland | OR |
| Santiam Water Control Dist. | Aumsville | OR |
| Shannon & Wilson, Inc. | Seattle | WA |
| Siemens Power Corporation | West Allis | WI |
| Sithe Energies USA, Inc. | New York | NY |
| Snohomish County PUD | Everett | WA |
| STS HydroPower, Ltd. | Issaquah | WA |
| STS HydroPower, Ltd. | Sacramento | CA |
| Tetragenics | Butte | MT |
| Van Ness, Feldman & Curtis | Seattle | WA |
| Van Ness, Feldman & Curtis | Washington | DC |
| Warm Springs Power Ent. | Warm Springs | OR |
| Washington Water Power Co. | Spokane | WA |

No. 92-1911

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

PUD No. 1 of JEFFERSON COUNTY
AND THE CITY OF TACOMA,

Petitioners,
v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE,

Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Washington

BRIEF OF AMICI CURIAE
AMERICAN FOREST & PAPER ASSOCIATION,
AMERICAN PUBLIC POWER ASSOCIATION,
EDISON ELECTRIC INSTITUTE,
AND NATIONAL HYDROPOWER ASSOCIATION
IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a state's inclusion of minimum stream flows for fish habitat in a section 401 water quality certificate exceed the authority granted to the states in section 401 of the Clean Water Act and infringe on the comprehensive authority to determine non-water quality related license conditions for hydroelectric projects that Congress granted to the Federal Energy Regulatory Commission in the Federal Power Act?

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Supreme Court of the United States

OCTOBER TERM, 1993

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PUD No. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,

v. *Petitioners,*

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
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BRIEF OF AMICI CURIAE
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AMERICAN PUBLIC POWER ASSOCIATION,
EDISON ELECTRIC INSTITUTE,
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IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The American Forest & Paper Association ("AFPA"), American Public Power Association ("APPA"), Edison Electric Institute ("EEI"), and National Hydropower Association ("NHA") submit this brief as *amici curiae*.¹

¹ Letters from counsel for Petitioners and Respondents consenting to the filing of this brief by *amici curiae* have been filed with this Court.

AFPA is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. APPA and EEI are the national trade associations of the publicly-owned and investor-owned segments of the nation's electric utility industry. NHA is the national association of hydroelectric project owners, builders, equipment suppliers, and consultants.² Together, APPA, EEI and NHA members generate approximately 85% of all electricity in the United States and serve approximately 90% of the nation's ultimate consumers of electricity.

The issues raised in Petitioners' Brief involve the interpretation and implementation by the states of section 401 of the Clean Water Act, 33 U.S.C. § 1341 (1988) and the effect of the states' broad interpretation of section 401 on the licensing of hydroelectric projects by the Federal Energy Regulatory Commission ("FERC"). The members of the *amici* associations hold the vast majority of the more than 1,000 licenses issued by FERC for hydroelectric projects located throughout the United States. Stream flow conditions are an essential component of these licenses, directly affecting each project's energy production and cost and other benefits created by the project. Expansion of state regulation of stream flows at hydroelectric projects pursuant to the Clean Water Act will have an extensive impact on the members of AFPA, APPA, EEI, and NHA and on the development and continued reliance on hydroelectric generating projects throughout the country.

Furthermore, the issues in this proceeding have national implications. FERC-licensed and other federal and non-federal hydropower projects represent a significant part of America's present energy supply, providing nearly 90,000 megawatts of electricity totaling approximately

² The particular interest of each association is more fully described in the Appendix. (A. 1a-2a).

12% of the electric capacity in the United States.³ Over 150 million consumers in 48 states, including residential, agricultural, commercial and industrial customers, benefit from the power generated by hydroelectric facilities.⁴ The long, useful life of hydroelectric facilities and their relatively low operating and maintenance costs place hydroelectric power among the least expensive sources of electricity, a benefit that inures directly to electricity consumers.⁵ In addition, hydropower is the nation's preeminent renewable energy resource, accounting for 83% of the clean, renewable energy on which the country relies.⁶

Under authority granted by Congress to FERC in the Federal Power Act,⁷ FERC establishes license conditions for projects pursuant to its jurisdiction to protect and reconcile competing water use demands, such as fish and wildlife habitat, aesthetics, recreation, navigation, water quality, water supply, generating capacity and energy output. The Federal Power Act requires FERC to give equal consideration to power and non-power values in licensing and relicensing hydroelectric projects. By balancing all of these considerations and tailoring appropriate license terms and conditions, FERC ensures that the public interest, as a whole, is served.

In contrast, state water quality agencies have a substantially narrower perspective and role in the licensing of hydroelectric projects. Through an overbroad reading of section 401 of the Clean Water Act, the state water

³ Edison Electric Inst., *Statistical Yearbook of the Electric Utility Industry/1991*, No. 59, Table 2, p. 8 (EEI, Washington, D.C., 1992).

⁴ National Hydropower Association, *Hydro Guide: Hydroelectric Resources of the United States*, "Introduction" (NHA, Washington, D.C. 1989).

⁵ *Id.*

⁶ Richard T. Hunt and Judith Mohsberg Hunt, *How Does Hydropower Compare With Other Renewables?* 7 (1993).

⁷ Codified in various sections of 16 U.S.C. §§ 791a-825r (1988 & Supp. 1992).

quality agency in this proceeding is seeking to usurp FERC's authority over the licensing process, inhibiting FERC's ability to weigh power and non-power values and to formulate terms and conditions in licenses for both new and existing hydroelectric projects.

As the national voices for all sectors of the hydropower industry, *amici* are vitally interested in a proper, harmonious and consistent interpretation and application of federal statutes affecting the development of hydroelectric power. Such interpretation and application are necessary to ensure that hydroelectric projects are licensed in a manner that best serves the public interest.

SUMMARY OF ARGUMENT

In its decision below, the Washington Supreme Court upheld the conditions requiring minimum stream flows prescribed by the Washington Department of Ecology in a water quality certificate that the Department issued for the Elkhorn hydroelectric project. This decision misinterprets and fails to harmonize the authority that Congress granted to the states in section 401 of the Clean Water Act with the comprehensive hydropower licensing authority that Congress granted to FERC in the Federal Power Act.

First, the Washington Supreme Court's decision improperly expands the scope of authority granted to the states in section 401 of the Clean Water Act. In upholding the conditions requiring minimum stream flows imposed by the Washington Department of Ecology on the Elkhorn Project, the Washington Supreme Court held that section 401 of the Clean Water Act grants the State of Washington the authority to impose non-water quality based minimum stream flows to protect fish habitat. The Washington Supreme Court's interpretation of the authority granted to the states in section 401 of the Clean Water Act ignores provisions of the Federal Power Act in which Congress expressly granted FERC ultimate authority over this issue and is inconsistent with this Court's opinions in

First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152 (1946) and *California v. FERC*, 495 U.S. 490 (1990), which interpret the scope of FERC's licensing authority in relation to the state regulation of water. Moreover, the Washington Supreme Court's interpretation of the authority granted to the states in section 401 of the Clean Water Act conflicts with the express provisions of section 401.

Second, the Washington Supreme Court's decision threatens to seriously disrupt the FERC hydropower licensing process. The practical consequence of the Washington Supreme Court's decision regarding the scope of state authority under section 401 is that individual states may usurp FERC's licensing authority. Under the Washington Supreme Court's interpretation of section 401 of the Clean Water Act, a state may impose conditions requiring minimum stream flows to protect fish habitat that severely constrain FERC's ability to establish reasonable license terms and conditions that are designed to address a broader range of factors affecting the public interest. Forty-eight states now have federally licensed hydroelectric projects under FERC jurisdiction. If the Washington Supreme Court's interpretation of the scope of authority granted to the states is adopted, FERC's authority to implement a national energy policy and to control the licensing process will be severely eroded, causing uncertainty and delay in the licensing of hydroelectric projects nationwide and the potential loss of energy and other benefits from this valuable resource.

ARGUMENT

I. THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE CERTIFICATION AUTHORITY GRANTED TO THE STATES IN SECTION 401 OF THE CLEAN WATER ACT IS INCONSISTENT WITH CONGRESS' GRANT OF AUTHORITY TO FERC IN THE FEDERAL POWER ACT.

Under the Washington Supreme Court's interpretation of section 401 of the Clean Water Act, a state may impose conditions on a FERC license, such as minimum stream flows to protect fish habitat, based on any state requirement related to use of a waterway. Specifically, the Washington Supreme Court found that, pursuant to section 401 of the Clean Water Act, the Washington Department of Ecology has authority to impose conditions requiring minimum stream flows to protect fish habitat, even though those conditions are not necessary to comply with the State's applicable water quality criteria. Under the lower court's reasoning, almost any water-related requirement of state law—whether pertaining to fish, wildlife, recreation, navigation or other non-water quality matters—can be imposed as a condition in a section 401 certificate. Congress did not intend for section 401 to apply so expansively.

Pursuant to the Federal Power Act, as amended in 1986 by the Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243 (1986) ("ECPA"), FERC possesses exclusive authority to establish license conditions relating to fish and wildlife and other non-water quality matters in the exercise of its statutory obligations to consider and reconcile competing water use demands. In contrast, by allowing states to issue and condition water quality certificates for federally-licensed activities pursuant to section 401, Congress provided the states with only limited authority to impose appropriate conditions based on applicable effluent limitations, water quality standards and other provisions specified in section 401 as well as state law requirements directly relevant to

such factors. The Supreme Court of Washington's interpretation of section 401 significantly exceeds the bounds of authority granted to the states and, consequently, upsets the balance of authority that Congress has established between state water quality agencies in section 401 and the federal licensing activities of agencies such as FERC in the Federal Power Act.

A. The Washington Supreme Court's Decision Is Incompatible With The Comprehensive Hydroelectric Licensing Program Created By Congress.

In 1920 Congress established the federal licensing program for hydroelectric projects when it enacted the Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920), which was incorporated into Part I of the Federal Power Act in 1935. The Federal Power Act established the former Federal Power Commission as the government agency with authority to issue licenses for most non-federal hydroelectric projects. 16 U.S.C. § 792 (1988). In 1977 the hydroelectric licensing authority held by the Federal Power Commission was transferred to FERC pursuant to the Department of Energy Organization Act. *See* 42 U.S.C. § 7151(b) (1988). FERC issues licenses not exceeding 50 years that authorize the construction, operation and maintenance of hydroelectric projects on navigable waterways or other bodies of water over which Congress has jurisdiction under its authority to regulate interstate commerce. *See* 16 U.S.C. § 797(e) (1988).

Part I of the Federal Power Act establishes the comprehensive regulatory program for hydroelectric power. Pertinent sections of Part I that demonstrate this fact include

—Sections 4(e), 10(a) and 10(j), which require FERC to determine whether and under what conditions a project will be best adapted to a comprehensive plan for use of the waterway and give equal consideration to power and certain non-power values in making that determination; and

—Section 15, which authorizes the relicensing of projects and the inclusion of terms and conditions in new licenses.

See 16 U.S.C. §§ 797(e), 803(a), 803(j), 808.

Pursuant to authority granted in the Federal Power Act, FERC must consider all factors affecting the public interest in the comprehensive development of the waterway. The comprehensive balancing authority granted to FERC under the Federal Power Act constitutes the core of the federal licensing process. Pursuant to this balancing authority, no license for a hydroelectric project shall be granted unless, in the judgment of FERC, the project is best adapted to a comprehensive plan for: (1) improving or developing a waterway for the use or benefit of commerce; (2) the improvement and utilization of water power development; (3) the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat); (4) irrigation; (5) flood control; (6) water supply; (7) recreation; and (8) other beneficial public uses. See 16 U.S.C. §§ 803(a), 797(e) (1988).⁸ Recent amendments to the Federal Power Act, the legislative history of those amendments,

⁸ FERC's regulations implementing Part I of the Federal Power Act also manifest the comprehensive nature of FERC's review of factors relevant to the development of a waterway. In 1981, largely in response to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1988), FERC amended the regulations that govern the contents of applications for hydroelectric projects. Among other things, the amended regulations require license applicants to prepare and submit to FERC several reports, including, a Report on Water Use and Quality, a Report on Fish, Wildlife and Botanical Resources, a Report on Historic and Archeological Resources, A Report on Socio-Economic Impact, a Report on Geological and Soil Resources, and a Report on Recreation Resources. See 18 C.F.R. 4.41(f), 4.51(f) (1993). FERC uses the information provided in these reports in its consideration of all relevant factors affecting the public interest in the development of the waterway.

and this Court's opinions all demonstrate that in creating this comprehensive hydroelectric licensing program Congress granted FERC the exclusive authority to establish conditions regulating stream flows for non-water quality matters, including minimum flows to protect fish habitat, such as those included in the State of Washington's Water Quality Certificate for the Elkhorn project.

In 1986, more than a decade after enacting the Clean Water Act, Congress enacted ECPA, which amended the Federal Power Act. The amendments that comprise ECPA ensure that nondevelopmental values, including fish and wildlife protection, recreational opportunities and energy conservation, are adequately considered by FERC in its determination of whether and under what conditions a hydroelectric license should be issued.

Amended section 4(e) of the Federal Power Act requires FERC, in determining whether to issue a license, to give "equal consideration" to power and various non-power values, including ". . . the protection, mitigation of damage to, and enhancement of fish and wildlife (including related spawning grounds and habitat)" See 16 U.S.C. § 797(e) (1988).⁹ This amendment pronounced the importance of FERC's consideration of non-developmental values, including the protection of fish and wildlife, in the hydroelectric licensing process.

⁹ The entire 1986 amendment to section 4(e) provides:

In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

Electric Consumers Protection Act of 1986 § 3(a) (1988), (codified as amended at 16 U.S.C. 797(e)).

ECPA also amended section 10(a) of the Federal Power Act by requiring that FERC's comprehensive planning process encompass non-developmental values, including the protection of fish and wildlife.¹⁰ As amended, section 10(a) requires FERC to weigh numerous factors that state water quality agencies are not required to consider under section 401 of the Clean Water Act, including regional power needs, water supply, recreation, and the effect of a project on fish habitat.

Additionally, section 10(j) of the Federal Power Act, as added by ECPA, explicitly reaffirms FERC's role as the ultimate decision-maker regarding fish and wildlife related concerns in the issuance of hydropower licenses. Section 10(j) provides that to "protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat)" affected by the project, each license shall contain conditions for such protection, mitigation and enhancement "based on recommendations received pursuant to the Fish and Wildlife Coordination Act . . . from the National Marine Fisheries Service,

¹⁰ Amended section 10(a) provides in relevant part:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

16 U.S.C. § 803(a)(1) (1988).

the United States Fish and Wildlife Service, and State fish and wildlife agencies." See 16 U.S.C. § 803(j)(1) (1988). While section 10(j) requires FERC to give special deference to recommendations made by state and federal fish and wildlife agencies regarding conditions appropriate for the protection, mitigation of damage to, and enhancement of fish and wildlife, FERC is not required to include such recommended conditions in the license. If, after affording the recommendations of fish and wildlife agencies due deference and considering relevant developmental and non-developmental values, FERC determines that such recommendations are inconsistent with the purposes and requirements of the Federal Power Act or other applicable law, section 10(j) explicitly grants FERC the authority to reject such recommendations. See 16 U.S.C. § 803(j)(2) (1988).¹¹

¹¹ Section 10(j) provides:

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) [16 U.S.C.A. § 661 et seq.] from the National Marine Fisheries Services, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Com-

The legislative history of ECPA confirms Congress' intention that FERC have ultimate authority to establish conditions requiring minimum stream flows for non-water quality related matters, including the protection of fish habitat. During the debates leading to the enactment of ECPA, the states sought to include a provision in the Federal Power Act that would have granted the states control over the appropriation, diversion, and use of water by licensed projects. Immediately prior to Senate passage of the Senate version of ECPA, Senator Baucus inserted into the record a position paper advocating such an amendment. Senator Baucus ultimately agreed not to offer amendments to the Senate version of ECPA that would grant this authority in exchange for an agreement from Senator McClure, Chairman of the Senate Committee on Energy and Natural Resources, to hold a Congressional hearing on the subject. *See* 99 Cong. Rec. S4448-49 (April 17, 1986). Although Senator McClure's committee conducted the hearing on September 12, 1986, no amendments regarding the grant of additional water use authority to the states were made to ECPA, either in conference or by the House or Senate. Instead, Congress reaffirmed FERC's exclusive authority over water use matters associated with licensed projects when it amended the Federal Power Act to include section 10(j). 16 U.S.C. § 803(j) (1988).

The conference report on ECPA demonstrates that ECPA did increase the states' role in determining fish

mission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

16 U.S.C. § 803(j).

and wildlife conditions in hydroelectric licenses, including minimum stream flow requirements, by directing FERC to give special deference to state fish and wildlife recommendations. Specifically, the conference report recognized that, "[t]he new section 10(j), which stems from the House amendment to S. 426, clearly and unmistakably upgrades the status of recommendations of the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the State fish and wildlife agencies made pursuant to the Fish and Wildlife Coordination Act." *See* H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 21, 23 (1986), reprinted in 1986 U.S.C.C.A.N. 2537, 2539. Increasing the states' authority in this way would have been unnecessary if Congress had previously granted the states authority in section 401 of the Clean Water Act to impose conditions regarding fish and wildlife, including minimum flows to protect fish habitat, at FERC licensed projects.

The states' limited role in determining fish and wildlife conditions in licenses is further demonstrated by other statements in the legislative history of ECPA that describe Congress' grant of authority to FERC to determine fish and wildlife conditions. In its description of section 10(j), the Committee of Conference stated:

... while new section 10(j) certainly upgrades statutorily the importance and status of fish and wildlife recommendations under the Fish and Wildlife Coordination Act, they are still recognized as "recommendations," not mandatory requirements as provided in section 30(c) of the Federal Power Act for exemptions under the Act.

H.R. Conf. Rep. No. 934, 99th Cong. 2d Sess. 21, 25 (1986), reprinted in 1986 U.S.C.C.A.N. 2537, 2541. Senator McClure, Chairman of the Senate Committee on Energy and Natural Resources and Chairman of the Committee of Conference, also echoed the statements of the Committee of Conference immediately before the Senate passed ECPA:

When we considered this legislation in the Senate, we sought to ensure that fish and wildlife considerations were fully and deliberately reviewed by FERC in setting conditions on a license. The House had the same concern. Neither body considered giving the fish and wildlife agencies the same type of mandatory conditioning authority which they have under section 30(c) for exemptions. Neither did either body want in any way to interfere with the role of FERC in balancing competing values.

See 99 Cong. Rec. S15384 (October 6, 1986).¹²

This Court has also acknowledged FERC's preemptive authority to determine license conditions relating to non-water quality related matters, including fish and wildlife. Forty-seven years ago, the Court first recognized that the exclusive nature of the federal hydroelectric licensing process preempts conflicting state action. In *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946), the Court rejected the State of Iowa's efforts to impose a state permitting requirement on an applicant for a hydroelectric

¹² Section 30 of the Federal Power Act governs exemptions from the requirements of the Act for conduit hydroelectric facilities. Pursuant to section 30(c) of the Federal Power Act, FERC, in determining whether an exemption is appropriate, must consult with the United States Fish and Wildlife Service and the relevant state fish and wildlife agency in the manner provided in the Fish and Wildlife Coordination Act and *must* include in any exemption, terms and conditions that the United States Fish and Wildlife Service and the relevant state agency believe are appropriate to prevent loss of, or damage to, fish and wildlife resources. See 16 U.S.C. § 823a(c) (1985). Section 30(c) of the Federal Power Act therefore grants the states authority to impose conditions relating to fish and wildlife in certain limited circumstances. The Committee's and Senator McClure's recognition of the extraordinary authority granted state fish and wildlife agencies in Section 30(c) and their express acknowledgement that Congress did not intend for state fish and wildlife agencies to have such mandatory conditioning authority in the normal licensing process, further demonstrate Congress' intention that FERC have exclusive authority to determine conditions relating to fish and wildlife in hydroelectric licenses.

license from the Federal Power Commission. The Court concluded that allowing the state to impose a permitting requirement would in effect grant the state veto power over the license and thereby subvert Congress' intention to concentrate comprehensive hydropower planning authority in the Federal Power Commission. *First Iowa*, 328 U.S. at 164.

More recently, this Court considered the State of California's authority to impose minimum flow requirements at hydroelectric projects to protect fisheries in *California v. FERC*, 495 U.S. 490 (1990). In that action, California argued that section 27 of the Federal Power Act, which reserves certain authority regarding proprietary water rights to the states, provided the state with authority to impose mandatory stream flow requirements for fish and wildlife. This Court rejected California's contention and unanimously held that the stream flow requirements mandated by California were preempted by the federal licensing program. In making that determination, this Court specifically recognized that the addition of section 10(j) to the Federal Power Act reaffirmed "*First Iowa's* understanding that the FPA establishes a broad and paramount regulatory role." See *California v. FERC*, 495 U.S. at 499.

In this proceeding, as a condition in the section 401 certificate to PUD No. 1 of Jefferson County and the City of Tacoma, the Washington Department of Ecology has imposed minimum stream flow requirements for the Elkhorn project based upon recommendations made by State fish and wildlife agencies pursuant to statutes that are unrelated to the State's water quality criteria adopted under the Clean Water Act. The Washington Supreme Court upheld the State agency's decision, in part, by concluding that the phrase "any other appropriate requirement of State law" in section 401(d) is not confined to state water quality standards. *Washington Dep't of Ecology v.*

PUD No. 1, 849 P.2d 646, 653 (Wash. 1993). The court found the quoted phrase to be "a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates." *Id.* The state actions the Washington court references would include the establishment of flows to provide for "preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values," Wash. Rev. Code § 90.54.020(3)(a) (1991), which are the very matters that Congress has determined to be in the exclusive purview of FERC. Because FERC has taken the position that it must accept the terms of the 401 water quality certificate as a part of the license,¹³ the inclusion of the conditions in the section 401 certificate makes such conditions mandatory on the Elkhorn project. As a result, the Washington Supreme Court's interpretation of section 401 eviscerates FERC's authority to consider other stream flow recommendations for fish habitat at the Elkhorn project pursuant to section 10(j) of the Federal Power Act and to balance competing uses of the water resource as mandated by section 10(a) of the Federal Power Act.

If the State of Washington had attempted to impose the prescribed minimum flow requirements or other similar conditions on the Elkhorn project under any State statute independent of the Clean Water Act, the State's action would directly conflict with the authority granted FERC under the Federal Power Act as reaffirmed by this Court in *First Iowa* and *California v. FERC*. The Washington Supreme Court's decision nevertheless interprets section 401(d) to provide states with the very authority to mandate license conditions that states could not otherwise exercise. This illogical interpretation of

¹³ See *Town of Summersville*, 60 F.E.R.C. ¶ 61,291 at 61,990 (1992); *Noah Corp.*, 57 F.E.R.C. ¶ 61,170 at 61,601 (1991); *Central Maine Power Co.*, 52 F.E.R.C. ¶ 61,033 at 61,172-73 (1990).

the authority granted the states under section 401 of the Clean Water Act ignores Congress' express acknowledgement of the comprehensive licensing process established under the Federal Power Act and this Court's explicit recognition of FERC's paramount role in the area of hydroelectric licensing, including fish and wildlife regulation, at federally licensed hydroelectric facilities.

B. The Washington Department Of Ecology Exceeded The Authority Granted To The States In The Clean Water Act.

The statutory language and legislative history of section 401 of the Clean Water Act demonstrate that Congress granted the states a narrower, more limited authority to participate in the federal licensing process than that found by the Supreme Court of Washington. Rather than repeat the entire argument made by the Petitioners regarding the State of Washington's failure to act within the parameters of the limited authority granted to it under section 401 of the Clean Water Act, *amici* will summarize several points addressed in more detail by Petitioners.

The Clean Water Act was enacted to regulate discharges into the nation's waters, particularly discharges involving the addition of pollutants into those waters. Within this context, section 401 specifically grants states the limited authority to certify that federally licensed projects will comply with applicable water quality standards and related criteria concerning discharges that are specified in section 401. Section 401(d) further provides that states may condition water quality certificates to ensure compliance with these requirements and "other appropriate requirements of State law" concerning activities that may result in discharges. As demonstrated in Petitioners' Brief, section 401 only grants state water quality agencies the authority to address the effect on water quality of discharges from federally licensed activities. This narrow grant of authority to the states was

not intended to intrude on the other areas of responsibility not involving water quality that Congress reserved to federal licensing and permitting agencies.

In this case, as a condition in the water quality certificate, the Washington Department of Ecology sought to impose—through its water quality certificate—month-by-month stream flow requirements for fish habitat that the state concedes are not required for water quality. Washington's published water quality criteria pertain to such matters as fecal coliform, dissolved oxygen, dissolved gases, and other water quality characteristics. By failing to limit the section 401 conditions to requirements designed to ensure that the project would comply with these water quality criteria, the State exceeded the limited authority that Congress granted it under section 401.

II. THE FERC HYDROPOWER LICENSING PROCESS WILL BE EFFECTIVELY PARALYZED, AND THE NATION'S HYDROELECTRIC PROJECTS WILL BE SEVERELY AFFECTED IF STATES ARE ALLOWED TO IMPOSE MINIMUM FLOW CONDITIONS FOR FISH HABITAT AND OTHER NON-WATER QUALITY CONDITIONS THROUGH SECTION 401 CERTIFICATIONS.

The Washington Supreme Court's overbroad interpretation of the authority granted the states in section 401 of the Clean Water Act directly interferes with the hydroelectric licensing process established in the Federal Power Act. According to FERC's own records, between the years 1993 and 2010, FERC must relicense 416 hydroelectric projects with a total power capacity of 26,202 megawatts, enough power to serve more than eight million people each year.¹⁴ These figures do not reflect applications for new hydroelectric power projects.

¹⁴ Edison Electric Inst., *Statistical Yearbook of the Electric Utility Industry/1991*, No. 59, Table Table 1, p. 7 (Total U.S. 1991 generating capacity) and Table 8, p. 14 (Estimated total U.S. 1991 population).

Conditions requiring minimum stream flows are of primary importance to these federal hydroelectric licenses. Stream flows affect not only power production but also project economics, project viability, recreation, navigation, fish and wildlife habitat, and many other concerns that FERC, but not a state water quality agency, must consider under the Federal Power Act. Because FERC has taken the position that it is constrained from modifying section 401 conditions imposed by the states, FERC, faced with overbroad section 401 conditions, cannot adequately perform its licensing responsibilities under the Federal Power Act. In fact, FERC may not be able to issue a license for a particular project at all if the state, by imposing improper section 401 conditions, makes the project economically unfeasible. Under the Washington Supreme Court's decision, a state water resource agency that has no obligation to consider the impact of its decision on energy production and the other benefits of hydroelectric projects can now decide the fate of hydroelectric projects instead of FERC, the agency to which Congress delegated authority to make those decisions.

If states are allowed to mandate minimum stream flows for non-water quality related matters such as fish habitat under the guise of the Clean Water Act, without appropriate balancing assessments made by FERC, hydropower and the many benefits that it provides to consumers, communities, and the nation will be severely affected. An increase in minimum flows at a hydroelectric project—in this case, for fish habitat—results either in lost energy production (because water is not diverted to power generation facilities) or in the production of energy when it is uneconomic or not needed. In either case, the lost hydropower must be replaced. To replace the lost power, electric suppliers must turn to other forms of production, particularly fossil fueled generation with consequent adverse implications for air quality, cost, diversity of the nation's energy supply, and other interstate

interests. In addition, increased minimum flows can adversely affect other beneficial uses of the waterway, including recreation and water supply.

For all of these reasons, Congress intended for the regulation of hydropower to have a comprehensive and national focus. When analyzing all of the competing interests that pertain to a hydroelectric project, FERC cannot and does not consider only localized concerns. River systems are not confined by state borders. Indeed, many state borders are defined by rivers, and many of the nation's largest rivers cross between or through multiple states. As a result, many hydroelectric projects affect water resources in more than one state.¹⁵ Recognizing this reality, FERC maintains a data base of hydroelectric projects by river basin in order to consider the impacts that a hydroelectric project may have on an entire river basin.¹⁶ For example, FERC may impose conditions in a license in order to facilitate fish migration from one state

¹⁵ See Map of Hydroelectric Plants Under FERC License For All Projects Having Total Potential Capacity of 15,000 Kilowatts Or More (As of Jan. 1, 1984), which is attached in the Appendix. (A. 3a).

¹⁶ When multiple projects in a river basin may have "cumulative" effects on the resources of the basin, FERC evaluates those effects as part of its environmental review when licensing the projects. For example, in 1989 FERC licensed a number of proposed new hydroelectric projects at existing dams on the upper Ohio River basin. *Allegheny Electric Coop.*, 48 F.E.R.C. ¶ 61,363 (1989). Because the FERC staff determined that the projects might have significant cumulative impacts on the basin, an environmental impact statement ("EIS") was prepared for the projects. After further input, the FERC staff issued a 600-page final EIS analyzing both cumulative and site-specific impacts on environmental resources, including water quality, fisheries, and recreation. As the D.C. Circuit noted in approving FERC's actions, the final EIS "analyzed the proposed projects from a number of different perspectives, including power generation, impact on water quality and fishery resources, effects on recreational facilities, and socio-economic conditions." *United States Dep't of Interior v. FERC*, 952 F.2d 538, 540 (D.C. Cir. 1992).

to another state for spawning. Alternatively, a dam located on a river may provide lake recreation or water for a municipality upstream of the dam, while releasing water through the dam for fish habitat downstream. The upstream and downstream locations may be in two different states, but the amount of flow for fish habitat will affect the water available for municipal purposes and lake levels at the community upstream. These considerations require the oversight of FERC, an agency with the mandate and responsibility to consider the consequences of flow conditions across state lines.

Because of the large number of hydroelectric projects that must be licensed or relicensed, and the prospect that each of the 48 states that presently has, or is proposed to have, a FERC licensed project within its borders will interpret section 401 differently in licensing proceedings, the potential for litigation and administrative delays to resolve section 401 disputes is enormous. By appropriately defining the limitations on the authority granted state water quality agencies under section 401 of the Clean Water Act, this Court can prevent disruption in the federal licensing process established by Congress in the Federal Power Act, while fully honoring the provisions of both statutes. An appropriate definition of the authority granted to the states in section 401 will allow state and federal agencies to perform their intended roles in implementing the Federal Power Act and the Clean Water Act, thereby ensuring FERC's ability to license projects in a way that safeguards the overall public interest and protects the viability of the nation's hydropower resources.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

THE AMICI

1. *American Forest & Paper Association*

American Forest & Paper Association ("AFPA") is the national trade association of the forest, pulp, paper, paperboard, and wood products industry, which as a group is the third largest producer of electricity among manufacturers in the United States and is one of the nation's leaders in the development and use of hydroelectric power. AFPA represents approximately 550 member companies and related trade associations (whose memberships are in the thousands), which grow, harvest and process wood and wood fiber, manufacture pulp, paper and paperboard products from both virgin and recovered fiber, and produce solid wood products. As a single national trade association, AFPA represents an industry that accounts for over 7 percent of the total United States manufacturing output and 90 percent of domestic recycled paper manufacturing capacity.

2. *American Public Power Association*

American Public Power Association ("APPA") is the national organization representing 1,750 of the nation's 2,000 local public power systems. These systems are located in every state except Hawaii and range in size from the largest public power system, the Los Angeles Department of Water and Power with more than 1.3 million customers, to small towns with fewer than 100 customers. Public power systems own approximately 11.9 percent of the total installed electric utility generating capacity in the United States. Hydroelectric projects, with a total installed capacity of 18,426,063 kilowatts, comprise nearly 21 percent of public power's total generation. There are 90 APPA member utilities with hydroelectric capacity. Certain of these utilities, such as the New York Power Authority and the South Carolina Pub-

lic Service Authority, market this hydroelectric power at wholesale to other publicly owned utilities.

3. *Edison Electric Institute*

Edison Electric Institute ("EEI") is the association of the nation's investor-owned electric utility companies.¹ Its members serve 97 percent of the customers of the investor-owned segment of the industry and 73 percent of all consumers of electricity in the United States. EEI's members generate 78 percent of all the electricity in the United States and service 76 percent of the nation's ultimate customers. A large number of EEI's members rely, either directly or through power purchase agreements, upon hydroelectric power to supply their customers' needs and to operate their systems. Over the last eighty years, investor-owned utilities have developed, operated and maintained large numbers of hydroelectric projects, and today operate approximately 366 such projects under licenses issued by the Federal Power Commission or its successor, the Federal Energy Regulatory Commission. These projects serve over 100 million Americans in forty-one states. As the national representative of the single largest group of hydroelectric project licensees, EEI has a vital interest in ensuring that the federal statutes governing the licensing of hydroelectric projects are interpreted consistently and implemented properly.

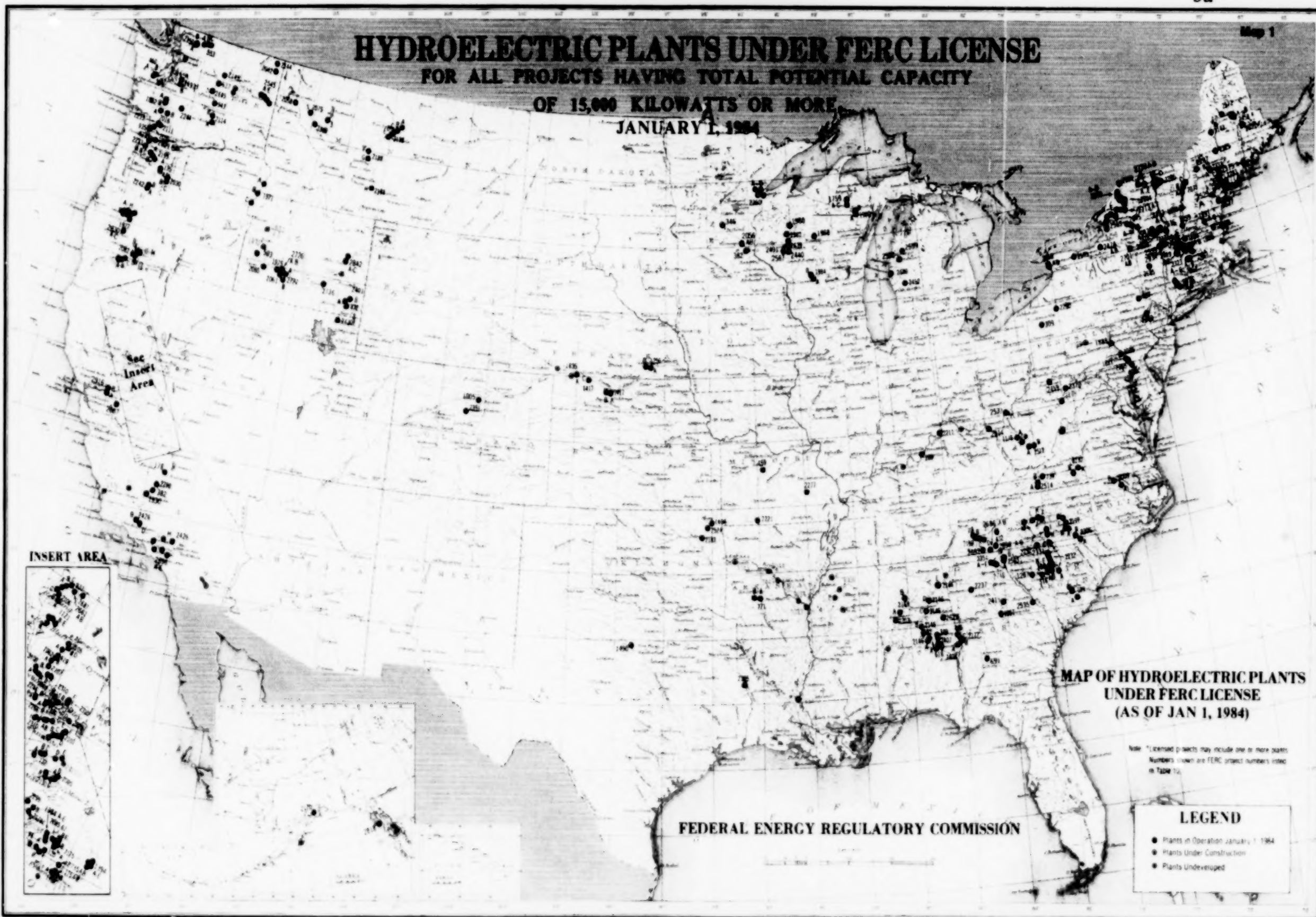
4. *National Hydropower Association*

National Hydropower Association ("NHA") is the non-profit association established in 1983 to be a national voice for the hydropower industry. NHA has over 100 members from all segments of the hydroelectric industry, including investor-owned utilities, cooperatives, municipalities, private developers, manufacturers, engineers, and legal, financial and consulting firms from all regions of the country.

¹ Consumers Power Company, a member of EEI, does not join in this *amici* filing.

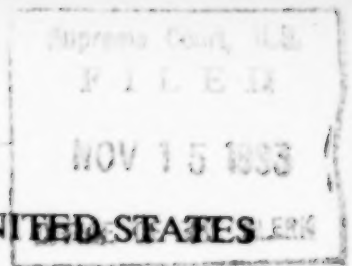
HYDROELECTRIC PLANTS UNDER FERC LICENSE FOR ALL PROJECTS HAVING TOTAL POTENTIAL CAPACITY OF 15,000 KILOWATTS OR MORE JANUARY 1, 1984

Map 1



No. 92-1911

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993



PUD NO. 1 OF JEFFERSON COUNTY AND
THE CITY OF TACOMA,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY, DEPARTMENT OF FISHERIES
AND DEPARTMENT OF WILDLIFE,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF PACIFIC NORTHWEST UTILITIES,
AMICI CURIAE, IN SUPPORT OF PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

PUD NO. 1 OF JEFFERSON COUNTY AND
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STATE OF WASHINGTON, DEPARTMENT OF
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AND DEPARTMENT OF WILDLIFE,
Respondents.

**BRIEF OF PACIFIC NORTHWEST UTILITIES,
AMICI CURIAE, IN SUPPORT OF PETITIONERS**

INTEREST OF AMICI CURIAE

Much of the electrical generating capability in the Pacific Northwest is hydroelectric. This brief is filed, with consent of the parties, on behalf of ten Pacific Northwest utilities, individually described in Attachment A. Some of these utilities are publicly owned and some are investor owned. Some are located in the State of Washington and some are located elsewhere. These amicus parties own and operate many of the largest nonfederal projects in the Pacific Northwest.

For many purposes, these utilities are competitors. They share, however, a united interest in and concern about the critical need to maintain the long-standing coordinated planning and operation of the Pacific Northwest's regional hydroelectric system. As explained below, it is imperative that these utilities operate their separate projects in coordination with one

another. That coordinated operation will be much more difficult, if not impossible, if this Court allows each individual state to determine unilaterally the minimum streamflows for every hydroelectric facility within its borders.

SUMMARY OF ARGUMENT

Unless it is reversed, the Washington Supreme Court's decision will create an unworkable system of dual authority over hydroelectric project licensing. That court's erroneous reading of the Clean Water Act allows state fish and wildlife agencies to interfere with a licensing process that Congress intended to be administered at the federal level, not by the states. As an immediate result of this erroneous decision, state agencies have already unilaterally imposed, in another Pacific Northwest licensing proceeding, minimum flow requirements that FERC's staff had previously concluded were inconsistent with the standards of the Federal Power Act.

The consequences of this kind of disruption will not be limited to individual hydroelectric projects. In the Pacific Northwest, what happens to an individual project affects all of a highly-coordinated regional hydroelectric system. That coordinated system's need for the consideration and accommodation of many diverse interests in a single authoritative forum has been well served for many years by FERC's exercise of its paramount authority over conditions of hydroelectric project licenses. Unless the Washington Supreme Court's erroneous reading of the Clean Water Act is reversed, there will be serious damage to a system which has long been working as Congress intended.

ARGUMENT

I. Unless the Washington Supreme Court's Decision Is Reversed, the Effects of Its Erroneous Interpretation of the Clean Water Act Will Be Felt Throughout the Pacific Northwest.

The coordinated Pacific Northwest hydroelectric system, and its operation under FERC's administration, are described below at pages 20-30. Unless the decision below is reversed, it will seriously disrupt that system.

The Washington Supreme Court's decision may well have rendered an entire hydroelectric project economically infeasible (Petition for Certiorari pp. 9, 15). That court mistakenly believed that the agency rulings it was reviewing were authorized (indeed, required) by § 401 of the Clean Water Act. The record is clear, however, that the minimum flows set by the Washington Department of Ecology ("WDOE") and approved on judicial review by the Washington Supreme Court are not necessary to maintain water quality in the Dosewallips River and are beyond WDOE's authority to impose.

The Clean Water Act regulates the discharge of pollutants. 33 U.S.C. § 1311(a). Section 401(a) of the Act requires state certification only for federal licenses or permits "which may result in any discharge." 33 U.S.C. § 1341(a)(1). Operation of the Elkhorn project would not cause the discharge of any pollutants into the Dosewallips River. Water would simply be removed from the river and then returned, unchanged, at a downstream location.

WDOE conceded that its mandated flows "are in excess of those required to maintain water quality in the bypass region" (Petition for Certiorari App. 83a). WDOE thereby acknowledged that those flows are not necessary to assure that water quality in the project reach will "markedly and uniformly exceed the requirements for all or substantially all uses" including fish and wildlife habitat.¹ Nevertheless, the Washington Supreme Court erroneously approved the imposition of WDOE's minimum flows, reasoning that they were necessary to assure that the project applicants would comply with "other appropriate requirement[s] of state law" within the meaning of § 401(d) of the Clean Water Act.

That decision creates an unnecessary and unintended conflict between two federal statutes. The State of Washington's role under the Clean Water Act is simply to protect water quality by regulating the potential discharge of pollutants as defined in that Act. FERC does not administer the Clean Water Act, and has concluded that it has no authority to determine whether or not conditions imposed by a state that has invoked the provisions of § 401(d) of that Act are authorized under that statute. *Town of Summersville*, 60 FERC ¶ 61,291 at 61,990 (1992), reh'g denied 63 FERC ¶ 61,037 (1993); *Carex Hydro*, 52 FERC ¶ 61,216 at 61,770-71 (1990);

¹This is one of the water quality standards specified in W.A.C. 173-201-045(1)(a) for Washington's Class AA (extraordinary) waters, W.A.C. 173-201-080(32), including the Dosewallips River. W.A.C. 173-201-045(1) also sets specific standards for identifiable pollutants in such waters.

Central Maine Power Co., 52 FERC ¶ 61,033 at 61,172 (1990). *Accord U.S. Dept. of Interior v. FERC*, 852 F.2d 538 (D.C.Cir. 1992). However, it is FERC's responsibility, not that of the states, to condition hydroelectric project licenses to protect fish habitat and spawning grounds.

The Federal Power Act ("FPA"), as recently amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, grants FERC paramount authority over the matters involved here. Under Section 10(j) of the FPA, each hydroelectric project license issued by FERC "shall include conditions for . . . protection, mitigation, and enhancement" of fish and wildlife, "including related spawning grounds and habitat." 16 U.S.C. § 803(j)(1). Those conditions "shall be based on recommendations" from state fish and wildlife agencies, among other sources. *Id.* FERC must either adopt the recommendations of state fish and wildlife agencies or publish findings explaining how their adoption would be inconsistent with the FPA or other applicable law. FERC must also find that any different conditions FERC does impose on the license satisfies the FPA's requirements for fish and wildlife protection and enhancement. 16 U.S.C. § 803(j)(2).

This procedure was adopted by Congress despite express requests by the states for independent authority to set mandatory minimum streamflows for hydroelectric

projects in order to protect fisheries.² In Sections 4(e) 10(a), and 10(j) of the FPA, 16 U.S.C. §§ 797(e) and 803(a), (j), Congress charged FERC, not the states, with paramount authority to provide for the protection, mitigation of damage to, and enhancement of fish, specifically including their spawning grounds and habitat. If WDOE had submitted its streamflows to FERC as § 10(j) recommendations, they would have received the consideration Congress intended.³ However, instead of submitting its recommendations for FERC's consideration and evaluation under that provision, WDOE included them in its § 401 certification, thereby circumventing the balancing process which Congress directed FERC to perform under § 10(j).

The Washington Supreme Court erroneously approved WDOE's maneuver. The decision below gave Washington's fish and wildlife agencies, through WDOE,

²See *Rock Creek Limited Partnership*, 38 F.E.R.C. ¶ 61,240, n.8 (1987); H.R. Conf Rep. No. 934, 99th Cong., 2d Sess. 23-25 (1986).

³Despite evidence that the WDOE minimum flows were designed to enhance or maximize fish habitat (PCHB No. 86-118, TP, Day 3, pp. 3-6, 27-29; Petition for Certiorari, App. 54a-57a), the Washington Supreme Court concluded that they were properly characterized as designed for "preservation" only. *State of Washington, Dept. of Ecology v. PUD No. 1*, 121 Wn.2d 179, 199, 849 P.2d 646, 657 (1993) (Petition for Certiorari, App. 27a). This dispute over proper characterization demonstrates that in fisheries management, as in other areas of environmental regulation, "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992). What flows are appropriate conditions of a federal license for fishery preservation or enhancement is a question for FERC to resolve under § 10(j), not an issue that a state may unilaterally determine in a water quality certificate.

an effective veto power over the construction of the Elkhorn project. That court's mandate issued on April 21, 1993 (Petition for Certiorari, App. 1a), and its effects manifested themselves immediately. One week later, on April 29, 1993, WDOE asserted its newly-approved unilateral authority on another Pacific Northwest hydroelectric project: Puget Sound Power & Light Company's White River Project. In the White River Project WDOE completely short-circuited FERC's painstaking § 10(j) process, rendering useless nearly a decade of work by FERC, Puget Power, and federal and state agencies.

II. The White River Project: Another Example of the Problem

In the case of the White River Project, WDOE has included in the § 401 certification minimum instream flows that do not address water quality, that far exceed flows necessary to preserve fish habitat, and that will result in staggering costs. Proceeding under § 10(j) of the FPA, FERC staff made a preliminary determination that those same flows were inconsistent with federal law. FERC staff found that the WDOE flows would cost approximately \$3,100,000 each year in lost power production as compared to alternative flows that FERC staff had developed. FERC staff specifically found that, despite the profound impact on power production, WDOE's flows would provide little or no additional potential benefit for the White River fishery. In the face

of that finding, WDOE imposed those flows in the § 401 water quality certification.

A. The Project

Puget Power is the largest investor-owned electric utility in the State of Washington, serving over 800,000 customers. This public utility services the electrical needs of residential, farm, commercial and industrial customers in Western Washington.

The White River Project, FERC No. 2494, was constructed in 1910-11, before the enactment of the FPA. Like Tacoma's proposed Elkhorn Project, the White River Project diverts water from a river, runs that water through a series of facilities to and through turbine generators, and then returns the water to the river downstream from the diversion.⁴

After Congress amended the FPA in the 1960s, the Federal Power Commission (FERC's predecessor) obtained jurisdiction over all projects constructed on navigable waterways prior to the FPA's enactment. The White River was determined to be "navigable" for

⁴The White River Project, however, differs from the Elkhorn Project in a number of ways. For example, (i) the White River is a river separate from the Dosewallips with a wholly different environment, (ii) the White River Project is already built and has existed for 83 years, (iii) the project has a storage reservoir (Lake Tapps), and (iv) Puget Power has existing water rights, storage rights and other rights pertaining to the White River and the Project. The Lake Tapps reservoir is subject to the Pacific Northwest Coordination Agreement.

purposes of the FPA,⁵ and Puget Power filed an application with FERC to license the project.

B. The FERC Licensing Proceeding

That license application has been pending since 1983. Over the last ten years, the appropriate instream flow between the point of water diversion and the point at which the diverted water is returned to the river (the "project reach" or "bypass region") has been the subject of extensive study and continuous, contentious dispute.

Since 1911, the Project has operated according to the judicially determined minimum instream flow requirements of Puget Power's water rights⁶ for the project -- 30 cubic feet/second ("cfs") -- a flow found sufficient for the White River by expert reviews made contemporaneous with the Project's original construction. This minimum flow was chosen because it would leave unimpaired any fishery interest in the White River.⁷

⁵See *Puget Sound Power & Light Co. v. Federal Energy Regulatory Comm.*, 644 F.2d 785 (9th Cir.), cert. denied, 454 U.S. 1053 (1981).

⁶Puget Power's vested water rights derive from claims dated April 17, 1895, and April 27, 1901, from the decree of the Superior Court of the State of Washington for Pierce County, *Pacific Coast Power Co. v. Quilquilion* (Decree No. 28120, dated April 13, 1910) (specifying the amount of Puget Power's water right, including the 30 cfs minimum flow), as well as from property acquired by Puget Power along the reach.

⁷White River Project, Additional Instream Supplemental Application for License, including Flow Studies and Flow Recommendations for the Project Reach of the White River (August 1987), on file with FERC in Project No. 2494 (hereafter "Flow Study and Recommendations"), at 8-9, 99.

In 1985, FERC staff directed Puget Power to perform an instream flow study for the project reach using the same Instream Flow Incremental Methodology ("IFIM") used in the Elkhorn Project. Puget Power conducted the IFIM study in consultation with all interested state and federal fisheries agencies⁸ and the Muckleshoot Indian Tribe (which has treaty fishing rights in the White River).⁹

C. Instream Flows Adopted by Puget Power and the Muckleshoot Indian Tribe

At the same time that the instream flow issues were being addressed in the licensing proceeding, Puget Power and the Muckleshoot Tribe were involved in separate litigation in federal district court on fishery issues involving the proper instream flow for the project reach.¹⁰ The Muckleshoot Tribe's reservation straddles the project reach and the Tribe has a right to take up to 50% of the harvestable fish that pass through its usual and

⁸These included National Marine Fisheries Service ("NMFS"), the United States Fish and Wildlife Service ("USFWS"), and the Washington Departments of Fisheries and Game (now Wildlife) ("WDF" and "WDW").

⁹The Muckleshoot Tribe's treaty fishing rights were confirmed in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 767 (9th Cir. 1975), *cert denied*, 423 U.S. 1086 (1976).

¹⁰*Muckleshoot Indian Tribe of the Muckleshoot Indian Reservation v. Puget Sound Power & Light Co.*, No. 472-72C2(V) (W.D. Wash.).

accustomed fishing sites.¹¹ The Muckleshoot Tribe is the main fishery user on the White River.

On October 31, 1986, with the approval of the federal district court, Puget Power and the Muckleshoot Tribe settled their lawsuit in a way that both parties believed (and continue to believe) would substantially enhance the White River fishery in a cost-effective way. They agreed that Puget Power would increase instream flows and construct a hatchery. As a consequence, the instream flows were increased by approximately 400%--from 30 cfs to 130 cfs--and certain supplementary flows were also provided.¹²

The Puget Power/Muckleshoot Tribe flows actually improve on nature. IFIM modeling shows that the flows that Puget Power is now providing result in more fish habitat than would have existed in the project reach with natural, unregulated flows. Also, the hatchery can produce as many fish as Puget Power and the

¹¹See, e.g., *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 767 (9th Cir.), *cert denied*, 423 U.S. 1086 (1976); *United States v. Washington*, 759 F.2d 1353 (9th Cir.), *cert denied*, 474 U.S. 994 (1985); *Dept. of Game v. Puyallup Tribe*, 414 U.S. 44 (1973); *Puyallup Tribe v. Washington Dept. of Game & State of Washington*, 433 U.S. 165 (1977).

¹²These flows are measured at the boundary of the Muckleshoot reservation. Puget Power began releasing 130 cfs immediately on conclusion of the settlement in 1986 and has been doing so ever since. This amount of water is equivalent to approximately 84 million gallons per day. By comparison, the entire metropolitan area of the nearby city of Tacoma, with a population in excess of 400,000, uses only an average of 70-75 million gallons per day.

Muckleshoot Tribe estimate were possible for the entire White River under natural conditions.¹³

D. FERC's Section 10(j) Proceedings

1. Alternative Flow Proposals Submitted to FERC

For the White River licensing proceeding, FERC considered several alternative flow proposals pursuant to its duty under § 10(j) of the FPA to include license conditions

... to adequately and equitably project, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation and management of the project.

16 U.S.C. § 803(j)(1).

While conducting and implementing the settlement negotiations described above, Puget Power, in full consultation with all interested state and federal fisheries agencies, conducted the instream flow study mandated by FERC for the licensing proceeding. Puget Power submitted to FERC its Flow Study and Recommendations, proposing adoption of the Puget Power/Muckleshoot

¹³Flow Study and Recommendations, *supra*, note 7, at pp. 110-11. Natural conditions restrict fish propagation in the White River. Factors in the river that adversely affect fish include its unusually high natural sediment load, channel instability, poor spawning gravel, loss of the Commencement Bay estuary, oceanic influences, and impacts on the river from forest harvest, fish harvest, agriculture, and urbanization. Flow Study and Recommendations, *supra*, note 7, at pp. 10-44.

Tribe flows and hatchery agreement as fishery enhancement conditions for the project license.

In 1987 and 1988, the federal and state fish and wildlife agencies submitted comments to FERC on Puget Power's Flow Study and Recommendations and also submitted their own joint minimum flow recommendation as contemplated by § 10(j) of the FPA. The agencies recommended much higher instream flows than those recommended by Puget Power and the Muckleshoot Tribe. Although the IFIM study results established that juvenile salmon rearing was inconsistent with such high flows, the agencies did not address this fact.¹⁴

In 1989, three of these agencies¹⁵, together with WDOE and the Puyallup Indian Tribe,¹⁶ submitted new recommended minimum flows. These recommended flows were again much higher than the Puget Power/Muckleshoot flows. This time, the agencies addressed the issue of juvenile salmon flows. However, instead of relying on the IFIM study, which the agencies

¹⁴Juvenile salmon prefer lower velocities due to limited swimming ability and stamina and metabolic constraints. Because higher velocities are usually associated with higher flows, rearing habitat for juveniles can be disrupted by flows with higher velocities. Flow Study and Recommendations, *supra*, note 7, at pp. 69-70, 88, 108-110.

¹⁵NMFS, WDF, and WDW

¹⁶The Puyallup Indian Tribe did not intervene in the FERC licensing proceedings for the White River Project until 1987. The White River is a tributary of the Puyallup River, which runs through the Puyallup Indian Tribe's reservation.

had previously acknowledged was properly conducted,¹⁷ they rejected the IFIM measurements for juvenile salmon on the strength of visual observations of the river at a few locations and a few flow levels.¹⁸ Relying on these visual habitat preference "estimates" in lieu of the IFIM study recommendations for juvenile salmon, the agencies developed their new flow recommendation (the "NMFS flows") which ranged from 350 to 500 cfs.

As with the Elkhorn project, the agencies' flow proposals for the White River Project did not address the balance of uses required to be considered under Sections 4(e) and 10(a) of the FPA. Those flows were designed solely to optimize fish habitat in the project reach.¹⁹

¹⁷See, e.g., Letter from Washington Department of Fisheries to Puget Power, dated August 21, 1987. White River Project, Response to Agency Proposals Regarding Instream Flow (March 1990), on file with FERC in Project No. 2494 (hereafter "Flow Response"), Attachment 2A.

¹⁸These observations were made by individuals who had not participated in the IFIM study.

¹⁹For example, USFWS described its work as follows:

The next step was to identify those flows (using the data supplied by Puget Power) that were optimum for each species/lifestage occurring in each month. . . .

Since there were always overlapping species or lifestages during any given month, we then examined all flows that fell between the highest and lowest optimal flow level for those overlapping species. A discharge was selected that minimized the difference in optimal flows for the overlapping species/lifestages determined to be the most sensitive to flow.

Letter from Charles A. Dunn to Kenneth F. Plumb dated December 3, 1987, p. 3, Flow Response, *supra*, note 17, Attachment 2B.

The agencies did not consider other uses or the costs of the flows to Puget Power's customers.²⁰

2. FERC Staff Rejected the Agencies' Proposal as Inconsistent with Federal Law

FERC staff reviewed the various competing instream flow proposals, as well as alternatives of its own, in an Environmental Assessment ("EA") issued in October 1992. FERC staff concluded:

No single alternative among the seven flow regimes we've examined would provide either the most or the least chinook habitat benefits for all four life stages -- each flow alternative is a tradeoff between the life stages The NMFS flows provide the highest values for the spawning and incubation life stages, Puget's flows provided the highest values for juveniles, and the staff #3 flows for adult holding. However, the staff #3 spawning and incubation values are within 1.3 percent of the NMFS values and cost about \$3.1 million per year less than NMFS. . . .²¹

²⁰For example, in the State of Washington Department of Fisheries' April 28, 1988 Section 10(j) comments to FERC on Puget Power's proposed flows, WDF stated:

Instream flows need to be set to protect the fisheries resource, not on [Puget Power's] analysis of whether these minimum flows will gain or cost their [sic] customers.

Page 8 of enclosure to April 28, 1988 letter from Joseph Blum to Lois Cashell, Flow Response, *supra*, note 17, Attachment 2C.

²¹Environmental Assessment for Hydropower License, White River Hydroelectric Project, FERC Project No. 2494-002 (October 9, 1992) at p. 69, on file with FERC in Project No. 2494.

As FERC staff found, the agencies' proposed flows would cost approximately \$3,100,000 more each year than the flows recommended by FERC staff. FERC staff determined that the agencies' recommended flows were not balanced or appropriate under federal law because they would impose an extraordinary cost with little or no correlative benefit to the fishery:

Under § 10(1) of the Act, we are making a preliminary determination that the . . . minimum flows recommended by the federal and state fish and wildlife agencies are inconsistent with the purpose and requirements of Part 1 of the Act.

As we discuss in the Comprehensive Development section, *we don't recommend adopting the minimum flows proposed by the fish agencies because the minimum flows included in our recommended alternative provide nearly comparable or greater fish habitat benefits at a much lower cost to power generation.*

Therefore, we believe the *agencies' recommendations are inconsistent with the public interest standard of section 4(e) [16 U.S.C. § 797(e)] and the comprehensive planning standard of section 10(a) [16 U.S.C. § 803(a)] of the Act.*

Id., at pp. 70-71 (emphasis added).

As its recommended alternative, FERC staff proposed flows approximately halfway between the agencies' proposed flows and those proposed by Puget

Power and the Muckleshoot Tribe. FERC staff concluded that these flows would fulfill the fish protection requirements of § 10(j) while also satisfying the other purposes and requirements of federal law.

3. FERC's Attempt To Resolve the Inconsistency

When FERC staff determines, under § 10(j), that an agency recommendation may be inconsistent with federal law, FERC is required to "attempt to resolve any such inconsistency" with the agencies. If the inconsistency cannot be resolved, then FERC staff must make written findings regarding the inconsistency and that FERC staff's own alternative license conditions appropriately protect, mitigate damage to, or enhance fish and wildlife (including related spawning grounds and habitat). 16 U.S.C. § 803(j)(2).

FERC staff's inconsistency determination for the White River Project therefore triggered further efforts by FERC staff to resolve the inconsistency with the agencies under § 10(j)(2). FERC staff held a meeting in January 1993 with the agencies, Puget Power and other interested parties. Although some inconsistencies were resolved, the inconsistency pertaining to minimum flows was not. FERC agreed to re-examine minimum flow alternatives and further information to be provided before making a final § 10(j) decision on instream flows.²² Puget Power, seeking an opportunity to demonstrate that its proposal

²²FERC staff summary of Section 10(j) meeting filed with FERC in Project No. 2494 (enclosure to FERC letter of February 17, 1993).

would better serve the public interest than either the agencies' proposed flows or FERC staff proposed flows, requested that FERC hold an evidentiary hearing on the instream flow issues.²³

²³The issues are very complicated and Puget Power believed that a hearing might facilitate their clarification and resolution. More than 4,000 pages of documents have been filed with FERC addressing the various parties' contentions. Puget Power contends that the higher agency flows are not supported--and are in fact contra-indicated--by available scientific information, even setting aside the natural habitat limitations of the White River. The agencies have not demonstrated that their flows will yield more fish than Puget Power's proposed flows. Yet, by the FERC staff estimate, the agencies' higher flows would cost approximately \$6.5 million more per year than the Puget Power/Muckleshoot Tribe flows and \$3.1 million per year more than FERC staff flows in replacement power costs over the term of the 40 year license. Some of the significant issues of material fact in dispute include:

- What is a realistic projection of the increase (if any) in fish from the agency or FERC staff flows as compared to the Puget Power/Muckleshoot Tribe flows?
- How does a realistic projection of fish benefits from the agency or FERC staff flows compare to the costs of providing such flows?
- Will the hatchery built by Puget Power provide reliable and increased fish production?
- Will the combination of flows and hatchery recommended by Puget Power and the Muckleshoot Tribe provide equivalent or greater fish benefits at a lower cost than the agency or FERC staff flows?
- How will the agency, FERC staff and Puget Power/Muckleshoot Tribe flows affect each of the various life stages, and thus the entire life cycle, of the various species of salmon?

4. WDOE Unilaterally Imposed the Flows FERC Staff Had Rejected

On April 29, 1993, after almost ten years of extensive efforts by all parties to determine appropriate instream flows for the Project, WDOE short-circuited FERC's entire § 10(j) process. Under the authority of the decision on review here, WDOE simply imposed the fisheries agencies' proposed flow regime as a condition of a § 401 certificate for the White River Project.²⁴

As a result, FERC concluded that it had "no authority to establish minimum flows lower than those set forth in the state's certificate" and that further inquiry into the minimum instream flow issue under § 10(j) of the FPA was pointless. 64 FERC ¶ 61,045 at 61,372 (1993).²⁵ After ten years of work devoted to identifying the issues and investigating the relevant facts, WDOE side-stepped FERC's authority and "resolved" these issues unilaterally by fiat. Puget Power then filed a declaratory action in federal district court challenging WDOE's authority to include minimum streamflows in the water quality certification.

²⁴During the Section 10(j)(2) meeting for the Project, WDOE "identified the Agency flows as its flows." See FERC staff summary of § 10(j) meeting, at p. 5.

²⁵FERC rejected Puget Power's request for an evidentiary hearing, reasoning that "no purpose would be served by holding an evidentiary hearing on instream flow issues" because "no party has suggested [under § 10(j)] that higher minimum flows are needed, and the staff's recommended instream flows are lower than those required in the certification." 64 FERC at 61,372. However, in a revised order issued October 12, 1993, FERC amended that order to "reserve the matter for disposition at a later time." 65 FERC ¶ 61,050 (1993).

certification. *Puget Sound Power & Light Co. v. Riveland* (No. C93-5267B; W.D. Wash.). That action has now been stayed pending the resolution of the instant case.

III. The Importance of FERC's Paramount Authority to the Operation of the Pacific Northwest Coordinated Hydroelectric System

Unless the decision below is reversed by this Court, WDOE's imposition of minimum flow requirements may well cause the loss of all of the hydroelectric power that could have been generated by the Elkhorn project. WDOE's assertion of that same unilateral authority over the White River Project, unreviewable by FERC despite the preliminary conclusions of the 10(j) process, could result in lost power generation from that project of at least \$3.1 million per year and perhaps more, with little, if any, corresponding benefit to the fishery (*see* page 16, *supra*). These losses and costs are not isolated or localized; they will affect users and ratepayers throughout the entire Pacific Northwest region.

At least in the Pacific Northwest, individual hydroelectric projects cannot be considered and evaluated in isolation. Since the early 1960s, the operation of most of the hydroelectric projects in the Pacific Northwest has been closely coordinated under the Pacific Northwest Coordination Agreement. This coordination provides substantial benefits to the public in the Pacific Northwest states and in Western Canada. The parties to the Agreement include fifteen public utilities that own and operate hydroelectric facilities in Washington, Oregon,

Idaho, Montana and Wyoming, and also the United States Departments of Energy and Interior, the Army Corps of Engineers, and the Bureau of Reclamation. The Agreement provides for the coordinated operation of well over one hundred hydroelectric plants, including twenty-one projects owned and operated by the United States government. The Bonneville Power Administration is a member of the coordinated system; therefore any change in power production at a single hydroelectric facility affects the price paid for electricity by every ratepayer in the Pacific Northwest and in much of California.

One important impetus for the Coordination Agreement was the Columbia River Treaty between the United States and Canada, signed in 1961.²⁶ Pursuant to that treaty, large storage reservoirs have been constructed in Canada. Those reservoirs contribute to regulation of the flow and provide downstream power benefits at various hydroelectric projects in the United States. The benefits are shared with Canada.

A primary purpose of the Coordination Agreement is to optimize firm power production throughout the Pacific Northwest and, at the same time, to provide for non-power uses of water resources. Under the Agreement each project must be operated within applicable legal and

²⁶Treaty between Canada and the United States of America relating to the cooperative development of the water resources of the Columbia River Basin," September 17, 1961, 15 U.S.T. 1555, T.I.A.S. No. 5638, 542 U.N.T.S. 244.

regulatory constraints. The Agreement also implements the Columbia River Treaty with Canada.

Each year the coordinated system utilities, BPA, the Army Corps of Engineers and the Bureau of Reclamation plan the operation of all projects in the system for the next operating year. This planning is done on a system-wide basis as though all projects were under unified ownership and control. The result is a detailed hydroelectric regulation program which defines the limitations on drafting and refilling of all reservoirs. The benefits of coordination are equitably distributed through a complex contractual arrangement. Daily adjustment and fine-tuning of the coordinated plan are made necessary by many variables, including especially the weather.

Runoff in the region is highly variable and does not occur in the same pattern as do electric power requirements and fish migration requirements.²⁷ The system's total storage capacity will accommodate less than half the total annual runoff, even in a below-average year. Thus the benefits of a large portion of the annual runoff must be captured within a short time or be lost forever. Taking such constraints into account, the coordinated system achieves a delicate balance among utility load requirements, reservoir storage capacity, and streamflow needs.

²⁷For example, in the Columbia River Basin, monthly mean unregulated streamflows can range from 40,000 cfs in January to 1,240,000 cfs in May, and annual runoff has ranged from 78 to 193 million acre-feet.

Each year the coordinated planning process must choreograph, for all of the system's more than 100 projects, the system-wide storage and release of water to provide for regional and international power needs while taking into account, for each project, minimum flow requirements, upper storage limits for flood control and recreation, the need to set aside water for increased streamflows to aid in the downstream migration of fish, spills of water from individual dams to transport juvenile fish around turbines, maximum outflows, tail water restrictions, and the specific operational constraints of each of the projects.

The result of this process is a regional system that is coordinated hydraulically, electrically, contractually, and economically. As a consequence, the terms of a single project license in the Pacific Northwest can have interstate and even international effects. To the extent that FERC has the final authority to determine the conditions of hydroelectric licenses, there is a single forum in which such potential long-range effects can be considered and balanced. To the extent that individual states can dictate those conditions on a particular project, the other projects in the system are at the mercy of individual states acting to protect their local interests.

Minimum flow requirements in particular can have a substantial impact on the ability of the system as a whole to optimize power production. They reduce the system's output and flexibility. Minimum flow requirements affect not only the individual project upon

which they are imposed, but potentially every project and utility in the entire coordinated system. Those effects are felt across interstate and international boundaries. If Oregon, Washington, Idaho, Montana, and Wyoming could each impose minimum flow requirements on local projects, the economic viability of projects throughout the system could be threatened.

Because the Pacific Northwest hydroelectric system affects many different entities and jurisdictions -- the states and their political subdivisions, the federal government, Canada, and various Indian tribes -- project license proceedings often produce conflict over issues such as flood control, irrigation, recreation, power production, international and Indian treaty rights, and fisheries. The fisheries issue itself frequently creates conflict between upstream and downstream entities. FERC's licensing process, governed by the FPA, provides mechanisms for considering and balancing these widely disparate interests.

A central feature of the FPA is Congress's commitment to coordinated study and comprehensive planning along an entire river system. *National Wildlife Federation v. F.E.R.C.*, 801 F.2d 1505, 1507 (9th Cir. 1986). In the Pacific Northwest an "entire river system" often spans several states and may extend into Canada. The FERC licensing process can accommodate and coordinate the many interests involved. To the extent that individual states can dictate the conditions of project licenses, the effectiveness of that process will be damaged.

When the hydroelectric licensing process works as Congress intended, state fish and wildlife agencies play an important role and are assured that they have a strong influence on the outcome. However, FERC retains its paramount authority over that process. It accommodates local fisheries interests as well as the many others that must be taken into account when determining whether a licensed project is "best adapted to a comprehensive plan" for improving or developing the waterway. 16 U.S.C. § 803(a)(1). Two Pacific Northwest projects provide excellent examples of FERC's use of that authority.

A. The Wells Dam Example

Wells Dam, operated under FERC License No. 2149,²⁸ is one of eleven dams located on the main stem of the Columbia River. The Columbia River has its origins in Canada. The volume of its flow in the Pacific Northwest states depends in part upon the operation of Canadian dams and reservoirs. Wells Dam is located in the State of Washington. The dam and its reservoir abut federally-owned lands, tribal lands of the Colville Indian Reservation, and private lands under the jurisdiction of various municipalities and the State of Washington. Immediately upstream are two federal dams (Chief Joseph and Grand Coulee). Immediately downstream are other mid-Columbia dams. Further downstream the Columbia River becomes the boundary between Washington and

²⁸Federal Power Commission, Order Issuing License (Major), Project No. 2149, July 12, 1962.

Oregon where it is spanned by several federally-owned projects.

The Wells license requires coordination with other facilities, with utilities in both Washington and Oregon, and with the Bonneville Power Administration which markets federal power in the Pacific Northwest. Under the terms of the license FERC can, when necessary, order that coordination.

The license specifically requires fish passage facilities. The Washington Departments of Fisheries and Game (now Wildlife), among others, participated before FERC in developing the details of that requirement.

The license also recognizes that the Wells reservoir will encroach upon the tailwaters of the Chief Joseph Dam of the Army Corps of Engineers. It requires the Wells Dam licensee to reimburse the Corps if that encroachment should interfere with power production.

The license also prescribes how the dam will be operated, for flood control, in conjunction with the federally-owned Dalles Dam downstream, as well as how the dam will use Canadian storage under the Columbia River Treaty for increased streamflow. It requires the licensee to provide power to the BPA federal system for delivery to Canada.

The many competing interests addressed by the Wells Dam license include power production, transmission arrangements, flood control and navigation under the jurisdiction of the Army Corps of Engineers, state and federal agency concerns regarding fish and wildlife,

archaeological survey and salvage, recreation, and coordination of the project with the United States Columbia River power system. In addition to the fisheries interests of the State of Washington, the license addresses the interests of other states in anadromous fish, tribal interests in treaty fishing rights, and federal interests in the anadromous and ocean fisheries.

B. The Priest Rapids Dam Example

The history of Priest Rapids Dam provides another example of the importance of FERC's authority.²⁹ The original Priest Rapids license, issued in 1955, provided for minimum flows which had to be coordinated with releases from a number of upstream dams including two, Grand Coulee and Chief Joseph, which are federally owned. Determination of those original minimum flows had required FERC to balance, in addition to all of the interests described in the discussion of the Wells license, the need to provide enough water for the cooling facilities at the Hanford Nuclear Reservation immediately downstream.

²⁹Priest Rapids, Wells Dam, and White River all have storage reservoirs that are operated under the Coordination Agreement. This coordinated reservoir operation is a major component of the Agreement. Under 33 U.S.C. § 1252(b)(6), no license granted by FERC for a hydroelectric power project

... shall include storage for regulation of streamflow for the purpose of water quality control unless the Administrator shall recommend its inclusion ...

See also 33 U.S.C. § 1252(b)(2). This provision does not apply directly to the Elkhorn Project, which has no storage reservoir.

In 1976, nests of salmon eggs downstream from Priest Rapids Dam were harmed during fluctuating flows. The affected state fisheries petitioned FERC to amend the Priest Rapids license to increase the minimum flows almost twofold. With the help of FERC's Administrative Law Judges, the licensee and the state fisheries agencies reached several interim agreements to address state minimum flow demands while balancing other competing interests.

Eventually the interested parties, under FERC's auspices, reached a landmark long-term settlement agreement which established a sliding scale of minimum flows based on how much spawning occurs at various water levels.³⁰ The ability of Priest Rapids to meet its minimum flow requirements without severe and imprudent reservoir drafts (which would adversely affect power production and recreational facilities), depends on releases from upstream federal storage projects. BPA is a party to this settlement and has agreed to provide releases from the Chief Joseph Dam to enable Priest Rapids to meet the new minimum discharge requirements. Two local utility districts also agreed to provide compensated reservoir draft at their upstream projects to assist Priest Rapids.

³⁰Setting minimum flow requirements too high can devastate fish populations. Spawning occurs at the edge of a stream in the shallows. The eggs can be exposed and destroyed if the water level was too high during spawning because of high minimum flow requirements and, for example, was later lowered by drought or other conditions.

The parties involved in this settlement, which was approved by FERC and arrived at under its auspices, included the Washington Departments of Fisheries and Wildlife, the National Marine Fisheries Service,³¹ the Oregon Department of Fish and Wildlife,³² BPA, various local utility districts, and three sovereign Indian Tribes (the Yakima, Umatilla and Colville tribes) which have treaty fishing rights and are not, by and large, subject to state jurisdiction.

As these examples show, the system designed by Congress in the FPA works. It works because under that system FERC has ultimate authority over the conditions of hydroelectric licenses. It would not work if each state could, without FERC's consent, unilaterally impose minimum flow requirements on projects within its borders to protect any of the many water-related matters in which the states may be interested from time to time. Such a regime would encourage parochial rather than system-wide planning and decision-making. It would leave other states and other project owners, including the federal government, without a forum authorized and directed to insure that their interests are given appropriate consideration and that decisions are ultimately based on a balanced, comprehensive consideration of various power and non-power interests. This would create an

³¹Salmon and steelhead may be caught in the Pacific Ocean where they mature before returning upriver to spawn.

³²Many of these fish are spawned and caught on the Oregon side of the Columbia River.

unworkable system of dual authority over questions of instream flow that was never intended by Congress and which Congress specifically refused to authorize in the FPA.

CONCLUSION

For the reasons discussed above and in the other briefs filed on behalf of the petitioners, the judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted,

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Company

ATTACHMENT A

THE PACIFIC NORTHWEST UTILITIES JOINING IN THIS BRIEF AS AMICI CURIAE

I. PacifiCorp

PacifiCorp, dba Pacific Power & Light Company and Utah Power & Light Company, is an investor-owned electric power utility based in Portland, Oregon, and Salt Lake City, Utah. PacifiCorp supplies power to a variety of residential, commercial, and industrial customers. Its service areas cover parts of seven western states and include several million people.

PacifiCorp owns and operates 54 hydroelectric facilities in seven states, including seven facilities in Washington. These facilities have a combined nominal generating capacity of slightly more than 1,000 megawatts, of which about half is generated by the Washington facilities. Hydroelectric power constitutes approximately 15 percent of PacifiCorp's total generating capacity, the remainder of which consists primarily of coal-fired generating plants. Because of the ability to adjust hydroelectric power generation rapidly, PacifiCorp relies heavily on its hydroelectric facilities to respond to daily, weekly, and seasonal fluctuations in power demand. In addition, PacifiCorp has responded to short-term load fluctuations through capacity purchases from the Bonneville Power Administration (BPA). The bulk of the capacity purchased through BPA is generated by hydroelectric facilities.

Nearly all of PacifiCorp's hydroelectric facilities, and all of its large facilities, are licensed by the Federal Energy Regulatory Commission. Many of these licenses will expire within the next few years and will require state certifications under section 401 of the federal Clean Water Act.

II. The Public Generating Pool and Its Members

The Public Generating Pool is a group of publicly-owned generating utilities located in the Pacific Northwest: City of Seattle, City Light Department (Seattle City Light); the City of Tacoma, City Light Department (Tacoma City Light); Chelan County Public Utility District (PUD); Cowlitz County PUD; Douglas County PUD; Grant County PUD; the Eugene Water & Electric Board (EWEB); and the Pend Oreille PUD.

The PGP utilities own hydroelectric facilities, licensed by FERC under the FPA, that have total nameplate ratings of nearly 700 Mws. These utilities serve nearly six hundred thousand retail customers. They are all interconnected through the BPA. As signatories to the Pacific Northwest Coordination Agreement, they coordinate their operations with the other privately and publicly-owned generating utilities in the Pacific Northwest as well as with BPA, the Corps of Engineers and the Bureau of Reclamation.

A. Seattle City Light

Seattle City Light owns four hydroelectric projects which have a total nameplate rating of 1200 Mws annually: Boundary, the Skagit Projects (Ross, Diablo and Gorge), Newhalem Creek, and Cedar Falls. It also purchases from five other hydroelectric projects, and has a FERC license for its project on the South Fork of the Tolt River, License No. 2459. Seattle City Light's Skagit Project, License No. 553, includes Ross Dam whose reservoir is partially in British Columbia and is fed by Canadian streams. In addressing license revisions for that project, FERC has not only considered minimum flows suggested by the Washington Departments of Fisheries and Game, but has also required Seattle City Light to address British Columbia Basin matters and to consult with the International Joint Commission. Cf. Federal Power Commission, Opinion No. 808, July 5, 1977.

B. Tacoma City Light

Tacoma City Light has three federally-licensed hydroelectric projects which have a total rating of approximately 700 Mws. It also purchases from other hydroelectric facilities. Its projects involve rivers with high spring runoffs when compared to reservoir storage capacity. In these licenses in particular, FERC has had to balance federal Army Corps of Engineers flood control concerns with State of Washington instream flow

recommendations for fish migration as well as with power production and other concerns.

C. Chelan County PUD

Chelan County PUD holds three federal licenses for hydroelectric facilities with a total rating of 1884 Mws, including two on the Columbia River: Rock Island and Rocky Reach. The Columbia River flows from British Columbia through Washington, then forms the border between Oregon and Washington until it empties into the Pacific Ocean. There are federally and nonfederally owned dams on the Columbia River and on its chief tributary, the Snake River. The Snake River originates in Wyoming, flows through Idaho, then forms the border between Idaho and Oregon and between Washington and Idaho before joining the Columbia River in Washington.

D. Cowlitz County PUD

Cowlitz County PUD holds the license for the Swift Project No. 2, License No. 2213, on the Lewis River. The project has a rating of 70 Mws and is operated in close conjunction with three nearby projects owned by the Pacific Power & Light Company. This license has provisions for federal navigation and flood control activities by the Army Corps of Engineers.

E. Douglas County PUD

Douglas County PUD owns the Wells Dam on the Columbia River. Wells has a rating of 820 Mws. The Wells license is described at pages 25-27 of this brief.

F. Grant County PUD

Grant County PUD owns two large federally-licensed hydroelectric facilities, Priest Rapids and Wanapum, on the Columbia River. Priest Rapids and Wanapum are rated at 788.5 and 880.4 Mws, respectively. The history of the Priest Rapids license is described at pages 27-29 of this brief. Grant County PUD also purchases from several small hydroelectric projects.

G. Eugene Water & Electric Board

The Eugene Water & Electric Board has three federally licensed projects on the McKenzie River in Oregon with a nameplate rating of 111.5 Mws. In 1973, the State of Oregon acknowledged FERC's authority to set minimum flows on this stream when it asked EWEB to request that FERC modify the minimum flow requirements under EWEB's federal license No. 2496 at Leaburg Dam, which was done and approved by FERC.

H. Pend Oreille PUD

Pend Oreille PUD owns the 64 Mws Box Canyon Project (FERC License No. 2042) on the Pend Oreille River in Washington. It also owns the Sullivan Creek Project (FERC Project No. 2225) which it operates under the Pacific Northwest Coordination Agreement, to provide storage but no generation of its own. Pend Oreille PUD also has capacity purchase rights from Seattle City Light's Boundary Project.

III. Puget Sound Power & Light Company

Puget Sound Power & Light Company is the largest investor-owned electric utility in the State of Washington. It serves 1.5 million people within a 4,500 square mile service area.

Puget Power is highly dependent upon hydroelectric power to serve the needs of its more than 670,000 customers. In 1987, 62.5 percent of Puget Power's load was served from hydroelectric resources: 6.7 percent from company-owned hydroelectric facilities, 37.7 percent from purchases under long-term contracts from hydroelectric projects on the mid-Columbia River owned by PUDs, and 18.1 percent from other purchases of hydroelectric. Puget Power currently has two federally-licensed projects, the Baker River and Snoqualmie Falls projects. It also has six hydroelectric license applications pending before FERC. Three of those pending

applications are for new projects (Swift Creek, Noisy Creek, and Thunder Creek), and three propose expansion at existing projects (White River, Snoqualmie Falls and Nooksack Falls).

No. 92-1911

Supreme Court, U.S.

FILED

NOV 16 1993

OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1993

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Petitioners,

v.

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Respondents.

**ON A WRIT OF CERTIORARI TO
THE SUPREME COURT OF WASHINGTON**

**BRIEF OF THE WESTERN URBAN WATER
COALITION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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**BRIEF OF THE WESTERN URBAN WATER
COALITION AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONERS**

In accordance with this Court's Rule 37, the Western Urban Water Coalition ("WUWC") has received written consents of counsel for both parties to file this brief as *amicus curiae*. Copies of the written consents have been filed with the clerk.

INTEREST OF *AMICUS CURIAE*

The WUWC is a national association of municipal water utilities of the largest cities in the western United States. The goal of WUWC members is to provide a reliable, high quality urban water supply for present and future water users,

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and the WUWC is organized to help achieve that goal through ground water policies; programs and regulations. Urban water supplies must be adequate to accommodate rapid regional growth, sustain people, and maintain and build the economy while protecting and enhancing western environmental values. The WUWC members currently serve over 30 million urban water consumers in the states of Arizona, California, Colorado, Nevada, Oregon, Utah and Washington.¹

Members of the WUWC own and operate water management, water supply and hydroelectric projects. These projects consist of dams, water conduits, reservoirs, power houses, transmission lines and other facilities involved in water supply, water transfer and power generation services. These facilities are essential to the ability of WUWC members to fulfill their mission of servicing the water resource-related needs of the majority of the populations of the western states.

In constructing, operating and maintaining these projects, members of the WUWC must obtain and comply with permits issued under § 402 (national pollutant discharge elimination system) and § 404 (discharges of dredged or fill material into wetlands) of the Clean Water Act ("CWA"), 33

¹The WUWC represents the following urban water utilities: Arizona - City of Phoenix; California - Central Basin Municipal Water District and West Basin Municipal Water District, Contra Costa Water District, East Bay Municipal Utility District, Los Angeles Department of Water & Power, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utility Commission, Santa Clara Valley Water District; Colorado - Denver Water Department; Nevada - Big Bend Water District, Las Vegas Valley Water District, Southern Nevada Water Authority, Westpac Utilities; Oregon - City of Portland, Bureau of Water Works; Utah - Central Utah Water Conservancy District, Metropolitan Water District of Salt Lake City; and Washington - City of Seattle.

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U.S.C. §§ 1342, 1344, and licenses issued under §§ 4 and 15 of the Federal Power Act ("FPA"). 16 U.S.C. §§ 797, 808. These federal permits and licenses require, as a prerequisite, that the state issue a water quality certification under § 401 of the CWA. By holding that a § 401 certification may specify conditions that do not relate to pollutant discharges, such as minimum stream flows for fisheries restoration and mitigation purposes, the Washington Supreme Court decision would impose significant new regulatory requirements on WUWC members. If not reversed, the decision will, in many instances, make it more difficult and costly for WUWC members to meet their obligations to provide water supply and hydropower to the residents of the major urban centers and make it less certain that they will be able to do so. In some cases, as in the hydroelectric project that Petitioners' propose to build, the opinion below will preclude the project altogether.

STATEMENT

Petitioners, a city and a public utility district, planned to construct a hydroelectric project in Washington. They sought a license from the Federal Energy Regulatory Commission ("FERC") as required by § 4(e) of the FPA. 16 U.S.C. § 797(e). They also sought a water quality certification from the Washington Department of Ecology as required by § 401(a) of the CWA. 33 U.S.C. § 1341(a). Washington's § 401 certification imposed a condition that Petitioners maintain a minimum stream flow in the river that is the proposed hydroelectric power source. The stated purpose of the minimum stream flow was to prevent degradation of fish habitat and spawning. That condition automatically becomes a condition on the FERC license or other federal permit under § 401(d).

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A. PETITIONERS' HYDROELECTRIC PROJECT

Petitioners propose to construct a new electric power generating facility, the Elkhorn Hydroelectric Project, on the Dosewallips River in Washington. The Elkhorn Project would divert, but not store, waters of the Dosewallips in a run-of-river mode of operation. The diverted water will run turbines to generate electricity and be returned to the Dosewallips downstream. The distance between the initial intake and the return - the bypass reach - is 1.2 miles. Pet. App. 4(a), 31(a).

Petitioners proposed to maintain minimum stream flows in the bypass reach of 65 cubic feet per second (cfs) to 155 cfs, depending on the month. The Washington State Department of Ecology issued a § 401 water quality certificate conditioned upon Petitioners' maintaining stream flows between 100 cfs and 200 cfs. Pet. App. 5(a). Petitioners assert that meeting the stream flow conditions of the § 401 certification would render the hydroelectric project economically infeasible.

The Supreme Court of Washington held that the § 401 condition of maintaining the higher stream flow levels was necessary to prevent the degradation of fish habitat and spawning in the Dosewallips. The court stated that the Department of Ecology had determined that the stream flow conditions proposed by Petitioners risked such degradation. Pet. App. 7a-8a. Significantly, the Department of Ecology concluded that although the stream flow conditions of the § 401 certification "are in excess of those required to maintain water quality in the bypass region, they are flows recommended by the resource agencies and tribes for maintaining sufficient flows for the fishery resource." Pet. App. 83a-84a.

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B. FEDERAL POWER ACT

Pursuant to § 4(e) of the FPA, FERC has exclusive authority to issue licenses for hydroelectric projects. 16 U.S.C. § 797(e). The FPA regulatory scheme requires FERC to consider and to balance "the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat) . . . and the preservation of other aspects of environmental quality." 16 U.S.C. §§ 797(e), 803(a)(1).

Section 10(j) of the FPA requires FERC to include in each license conditions for the protection, mitigation and enhancement of fish and wildlife as enumerated in §§ 4(e) and 10(a). Specifically, the "conditions shall be based on recommendations received . . . from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and state fish and wildlife agencies." 16 U.S.C. § 803(j)(1). The FPA further provides in § 10(j)(2) that FERC must decide whether the recommendations are inconsistent with the purposes and requirements of the FPA. If FERC cannot resolve inconsistencies, it may refuse to adopt in whole or in part the recommendations of fish and wildlife agencies, but FERC must make specific findings supporting its decision. 16 U.S.C. § 803(j)(2).

C. CLEAN WATER ACT

The CWA sets forth a complex regulatory system administered primarily by the Environmental Protection Agency ("EPA"), but also administered by the States under EPA supervision. Section 401 requires a state certification as a prerequisite to the issuance of a federal permit or license (including a FERC hydroelectric project license) to construct or operate a facility "which may result in any discharge into

the navigable waters." 33 U.S.C. § 1341(a)(1). The state must certify that any discharge will comply with §§ 301, 302, 303, 306 and 307 of the CWA.

Section 401(d) requires that a water quality certification set forth "effluent limitations and other limitations, and monitoring requirements" to assure that the applicant for any federal license or permit will comply with limitations or standards under §§ 301, 302, 306 or 307, and with "any other appropriate requirement of State law" set forth in the certification. Any limitation or condition in the certification "shall become a condition on any Federal license or permit." 33 U.S.C. § 1341(d)

FERC has concluded that it has no authority to reject or alter conditions in a § 401 certification, even if the conditions are outside the scope of § 401, and that only state courts may pass judgment on such certifications. *Town of Summersville*, 60 F.E.R.C. ¶ 61,291 at 61,990 (1992), *reh'g denied*, 63 F.E.R.C. ¶ 61,037 (1993); *Dept. of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992). EPA has similarly concluded that state limitations and conditions in certifications are reviewable only in state courts, 40 C.F.R. § 124.55(e), and the courts have agreed. *Roosevelt Campobello Int'l Park Comm'n. v. EPA*, 684 F.2d 1041 (1st Cir. 1982); *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977).

SUMMARY OF ARGUMENT

This case presents a fundamental issue of statutory construction of § 401 of the CWA. The State of Washington exceeded its authority to issue a water quality certification under § 401(d) by imposing a condition that Petitioners maintain minimum stream flows. If § 401 is construed to authorize states to impose conditions not related to pollutant

discharges, such as stream flow requirements, state certifications will directly conflict with the exclusive responsibilities of FERC under § 10 of the FPA, confuse the separate regulation of water quality and water quantity, and expand the CWA into areas of regulation not intended by Congress. Although the content of water quality standards may present a question of state law, questions regarding compliance with the CWA, including the scope of § 303 and the scope of authority of the States to issue § 401 certifications, are federal questions. Section 401 should be construed in connection with other provisions of the CWA and can and should be construed in a way that the apparently conflicting provisions of the FPA and CWA are harmonized.

Section 401(a), not § 401(d), as assumed by the Supreme Court of Washington, authorizes states to issue water quality certifications. Section 401(d) defines the conditions that may be placed on certifications by reference to the applicable CWA provisions with which compliance is required by § 401(a)(1). Each of the listed applicable provisions, like the core purpose of the CWA, is directed at limiting or controlling pollutant discharges into navigable waters. The authority of states to impose conditions in § 401 certifications is circumscribed: the condition must limit (a) pollutant discharges (b) to assure that the discharges comply with (c) listed applicable CWA provisions directed at discharges. If there is no pollutant discharge, the certification must be unconditional.

Washington's minimum stream flow requirement is not a condition authorized by § 401. It is not a condition on Petitioners' proposed discharge (the return of waters through a tailrace), but rather a requirement regarding the stream itself. It is also not a condition that relates to compliance with the applicable CWA provisions listed in § 401 because it is not a limitation on pollutant discharges.

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Section 401(d)'s use of the phrase "any other appropriate requirement of State law" also does not authorize the stream flow condition. That phrase, under principles of *ejusdem generis*, must be construed in connection with the listed CWA provisions that precede it, all of which serve to restrict pollutant discharges. The only appropriate state law requirements that may be the basis of a condition in a § 401 certification are those requirements establishing limitations on pollutant discharges to navigable waters. A minimum stream flow is not such a requirement. "[O]ther appropriate requirement of State law" has a purpose, however, for it allows a § 401 certification condition to impose state restrictions on pollutant discharges above and beyond the restrictions of the CWA. This reading of § 401 is consistent with the power of the States, preserved in § 510 of the CWA, to impose more stringent requirements.

ARGUMENT

I. PRINCIPLES OF STATUTORY CONSTRUCTION REQUIRE THAT § 401 BE CONSTRUED CONSISTENTLY WITH OTHER PROVISIONS OF THE CWA AND CONSTRUED TO BE IN HARMONY WITH APPARENTLY CONFLICTING PROVISIONS OF THE FPA

The Supreme Court of Washington held that the stream flow condition of the § 401 certificate was necessary for the State to certify compliance with state water quality standards and was authorized by the language of § 401(d) allowing states to condition certification on "any other appropriate requirement of State law." The Court erred in construing one provision of § 401 in isolation, without reference to the whole of the CWA or even all of § 401 as a context for discerning Congress' intended meaning.

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In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.

Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (quoting *United States v. Heirs of Boisdoré*, 8 How. 113, 122, 49 U.S. 113 (1849)). Particularly in the context of a complex regulatory system such as the CWA, a given section should be construed in connection with other parts and sections to achieve uniformity of approach and consistency of meaning. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977); *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987).

Not only did the court below fail to follow the principle that statutes must be read as a whole, it never attempted to harmonize its CWA construction with the apparently conflicting provision of the FPA. Instead, the court reasoned that FERC might impose the same stream flow condition under § 10(j) of the FPA as Washington attempts to impose under § 401 of the CWA, and, therefore, there was no actual conflict between the State's certification under § 401 and FERC's obligations under § 10(j) of the FPA. Thus, it rejected Petitioner's argument that the FPA preempted a state's ability to impose stream flow conditions under § 401. This reasoning is erroneous because under § 401 of the CWA certification conditions become conditions on the FERC license by operation of § 401(d). Thus, FERC is foreclosed from imposing a conflicting condition because the state has usurped its responsibility.

Quite plainly, § 10 of the FPA vests FERC with authority—not yet exercised in this case—to determine under a balancing test whether stream flow requirements are a necessary condition of the license. In *California v. FERC*,

495 U.S. 490 (1990), this Court rejected a state's imposition of stream flows for fish protection under § 27 of the FPA. In that case, California's action under state law was found inconsistent with, and therefore preempted by, FERC's primary role to set stream flows in connection with licensing hydroelectric projects. Congress would not have granted this authority to FERC in enacting § 10(j) of the FPA in 1986 if it had already vested states with authority over stream flows as water quality conditions under § 401 of the CWA.²

Unless the conflict between them is irreconcilable, related statutes should be read *in pari materia* to give effect to each. "Statutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible." 2A C. Sands, *Sutherland Statutory Construction*, § 51.02 (4th ed. 1984); *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). In this case § 401 can be construed consistently with § 10 of the FPA and consistently with other provisions of the CWA. As a matter of statutory construction, that course must be followed to avoid the conflicting mandates that might otherwise lead to an implied repeal or limitation of § 401 by the later and more specific § 10(j) of the FPA.

²Congress has also recognized in the CWA that stream flow regulation is within FERC's authority. Section 102(b)(6) of the CWA expressly excepts from FERC license authority "storage for regulation of streamflow for the purpose of water quality control unless the Administrator [of EPA] shall recommend its inclusion" 33 U.S.C. § 1252(b)(6). Although storage for regulation of stream flow is not applicable in the instant case because Elkhorn is to be a run-of-river mode of operation, § 102 excepts storage regulation from FERC authority, not state authority under § 401.

II. SECTION 401(a)(1), NOT § 401(d), ESTABLISHES THE BOUNDS OF STATE CERTIFICATION

Section 401(a)(1) requires that, in order to conduct a proposed activity that "may result in any discharge into the navigable waters," an applicant for a federal license or permit obtain a certificate from the state that "such discharge will comply with the applicable provisions" of §§ 301, 302, 303, 306 and 307. If there is no applicable effluent limitation under §§ 301(b) or 302 and no applicable standard under §§ 306 and 307, the state is to so certify. Under § 401(d), the state is to include in its certificate any condition necessary to "comply" with an effluent limitation under §§ 301 or 302, a standard of performance under § 306, a prohibition, effluent standard or pretreatment standard under § 307, or "any other appropriate requirement of State law."

Section 401 was adopted from § 21(b) of the pre-1972 Federal Water Pollution Control Act. See Water Quality Improvement Act of 1970, Pub. L. No. 91-224 § 103, 84 Stat. 91. The earlier version required state certification that a federally licensed activity with a discharge would "not violate applicable water quality standards," § 21(b)(1). The earlier version also lacked a counterpart to the present § 401(d). When Congress passed comprehensive amendments to the water pollution control statute in 1972 (Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1977)), it made significant changes to § 401. In § 401(a) it substituted compliance with the appropriate provisions of §§ 301, 302, 306 and 307 for compliance with water quality standards as the subject of certification. It also substituted certification of the discharge for certification of the discharging activity. Finally, it added § 401(d). Section 401 was subsequently amended in 1977 to add § 303 to the list of provisions appearing in § 401(a).

Clean Water Act of 1977, Pub. L. No. 95-139, 91 Stat. 1566. According to the Conference Report, this was not intended to change existing law but to clarify that water quality standards from § 303 were already incorporated by referring to § 301. Indeed, the Conference Report concluded, "section 303 is always included by reference where section 301 is listed."³

Section 401(a)(1) governs the scope of Washington's certification, not § 401(d), as the court below assumed. Section 21(b)(1) required certification using language virtually identical⁴ to that used in § 401(a). Section 21(b)(1) had no counterpart to § 401(d). The pre-1972 equivalent of § 401(a)(1) served very well with no equivalent of § 401(d). Thus, § 401(d) was a relative afterthought and is not the driving force of the section. The wording of the two parts of the section makes this clear. Under § 401(a)(1) "any applicant for a federal license ... shall provide ... a certification from the State. ... No license ... shall be granted if certification has been denied" Moreover, § 401(a)(1) establishes precisely what the state must certify: that any discharge from the licensed activity "will comply with the applicable provisions" of §§ 301, 302, 303, 306 and 307. Subsection 401(d) is clearly subordinate, providing only

³H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. at 96 (1977). Its conclusion is correct: § 301(b)(1)(c) does incorporate water quality standards into § 301, although it does not mention § 303. But as § 303 is the section establishing water quality standards, its incorporation is inherent when incorporating water quality standards. Indeed, because Congress in its 1972 amendments to the Act retained water quality standards as one means of deriving effluent limitations for pollutant discharges, it would be inconsistent with congressional intent in the 1972 amendments to ignore water quality standard-based effluent limitations in § 401 certifications.

⁴The exception, of course, was that the pre-1972 provision focused on compliance with water quality standards while the post-1972 provision focuses on compliance with the applicable requirements of the enumerated provisions.

more detailed instructions as to the content of the certification required "under this section," *i.e.*, under § 401(a)(1).

Section 401(d) adds nothing to this list of applicable provisions other than the terminal phrase "any other appropriate requirement of State law." As argued in greater detail in Part IV below, the general phrase cannot expand the class of specific limitations that precedes it. Thus, the phrase means state restrictions on pollutant discharges that are in addition to or more stringent than restrictions contained in provisions listed in § 401(a)(1).

III. THE STREAM FLOW MAINTENANCE CONDITION IN WASHINGTON'S CERTIFICATION IS BEYOND THE AUTHORITY FOR STATE CERTIFICATION ESTABLISHED IN § 401(a)(1)

The certification requirement is found in § 401(a)(1), and that section, not § 401(d), is where the analysis of any claimed authority to impose stream flow maintenance conditions must begin. Certification is not required for every federally licensed activity, but only for those which may involve a "discharge" into navigable waters. The state is authorized to certify only that (a) the "discharge" will (b) "comply" with the (c) "applicable" provisions of the listed sections. Each of these concepts limits the scope of certification and hence the conditions that can be imposed in certification.

A. Stream Flow Maintenance Is Not A Condition Authorized By § 401 Because It Does Not Involve A "Discharge"

"Discharge" is defined in § 502(16): "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." Those terms, in turn, are defined in § 502(12), and together they evoke the basic prohibition of § 301(a) against the discharge of a pollutant without or in violation of a § 402 permit. When parsed in conjunction with the definitions in § 502, § 301(a) makes unlawful the addition of a pollutant to navigable waters from a point source without a permit or in violation of permit conditions.⁵

Because the definition of "discharge" "includes" the term of art, "discharge of pollutants," the definition of the general term "discharge" suggests a broader connotation than only the "discharge of pollutants." The import of § 502(16) then, is that federal licenses or permits for activities that result in discharges of pollutants require § 402 permits and § 401 certifications; while federal licenses or permits for activities that result in other types of discharges to navigable waters that do not require § 402 permits still require § 401 certifications. The broader reading of "discharge" is further supported by the fact that "discharge" was used in the original § 21(b), before "discharge" was defined, before

⁵Section 401 could be read as applying only to the discharge of pollutants which requires a § 402 permit. EPA takes the position that the type of discharge at issue here does not require a § 402 permit, and the courts have concurred in that position. *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). Reading § 401 to apply only to § 402 "discharges of pollutants" would make the provisions redundant.

"discharge of a pollutant" was used or defined, and before there was a § 402 permit requirement for the "discharge of a pollutant." Finally, the certification requirement is most useful for discharges which do not require a § 402 permit. When a § 402 permit is required, EPA or the state will apply the requirements of §§ 301, 302, 303, 306 and 307 to derive effluent limitations on pollutants in the discharge. If a discharge requires no § 402 permit, however, the state under the § 401 certification process, nonetheless, makes that determination thereby assuring protection of the receiving waters.

Section 401 itself does not indicate any particular meaning for "discharge" beyond common parlance. *Webster's Third New International Dictionary* 644 (1986) defines discharge as "a flowing or issuing out . . . a rate of flow" and gives as an example of usage "a rapid [discharge] of water from a pipe." Under this definition the term "discharge" is independent of whether it adds a pollutant to a navigable water from a point source.

The condition in Washington's certification requiring maintenance of minimum stream flows in the Dosewallips River is not a condition on the discharge from the proposed activity into navigable water. It is therefore not within the authorization of § 401. Section 401(a)(1) is very specific in this regard. It does not require certification of all federally licensed activities or even those occurring in or affecting navigable water; it requires certification only for federally licensed activities that have a discharge into navigable waters. Moreover, even for federally licensed activities requiring a § 401 certification, § 401(a)(1) does not require certification regarding all aspects of the activity; it requires certification only regarding the discharge from the activity into navigable waters. In fact, Congress amended § 401(a)(1) in 1972 to make this clear. The only authorized flow rate

condition under § 401(a)(1) is for the flow rate of the discharge by the federally licensed activity through the tailrace into the river and not a condition on the flow rate of the river itself. The flow of the river simply is not "a discharge into navigable water" from a federally licensed activity.

B. Stream Flow Maintenance Is Not A Condition Authorized By § 401 Because It Does Not Require "Compliance" With "Applicable" Provisions Listed In § 401(a)

Section 401(a)(1) requires certification that the discharge into navigable waters from a federally licensed activity will "comply" with "applicable" provisions of the listed sections. Both terms must be read in connection with the word "discharge." It is the discharge that must comply with applicable provisions, and in order to be "applicable," the provision must be one that establishes a requirement directed at the discharge. Section 401(a)(1) requires certification that the discharge into navigable waters from a federally licensed activity will comply with applicable provisions of §§ 301, 302, 303, 306 and 307. Those sections establish requirements for both the regulatory agencies and for the regulated public. To qualify as an applicable provision of §§ 301, 302, 303, 306 or 307 for the purpose of § 401(a)(1) certification, the provision must apply some requirement with which the federal licensee, as a member of the regulated public, can comply. Obviously, if a listed provision states a requirement for regulatory agencies to meet (*e.g.*, establishing water quality standards), the regulated public cannot comply with the requirement and it cannot be a condition in a § 401 certification. Each of the listed sections provides requirements to be met by the regulated public: effluent limitations or standards for pollutant discharges.

Section 401(d) contemplates certification conditions that are "applicable" "effluent limitations" or "other limitations" under § 301 and § 302, "standard of performance" under § 306, or "prohibition, effluent standard, or pretreatment standard" under § 307. Although differently styled, each listed section serves to establish a variant of a single concept: restrictions on the amounts or concentrations of pollutants in a discharge. Review of these listed CWA provisions reveals that each is concerned with restrictions of pollutant discharges. Regulation of stream flow is not restricting a pollutant discharge and is therefore beyond the authority of § 401.

1. § 301

The basic regulatory prohibition of the Act is established in § 301(a). It makes unlawful the discharge of a pollutant except in compliance with § 301 and other enumerated sections, §§ 302, 306, 307, 318, 402 and 404. Apart from establishing the basic prohibition against the discharge of pollutants, § 301 does nothing more than establish effluent limitations that must be achieved by point sources as conditions of § 402 permits. Effluent limitations are of two types, and the point source must meet the more stringent of the two. The first is derived from various levels of treatment technology, § 301(b)(1)(A) and (B) and (b)(2). The second is calculated to achieve water quality standards, § 301(b)(1)(C). See also 33 U.S.C. §§ 1312 and 1313. Both are restrictions on the amounts or concentrations of pollutants in a discharge. Prior to 1972, federal water pollution control legislation focused entirely on requiring that discharges meet water quality-derived limitations. Comprehensive amendments of the statute in 1972 for the first time focused on requiring that discharges meet technology-based limitations that were made the primary focus of the CWA. *See EPA v. California*, 426 U.S. 200 (1976). Section 301(b)

also establishes deadlines for achieving its various effluent limitations. The remainder of § 301 consists of provisions for modifications of and variances to the technology-based effluent limitations and the deadlines for achieving them.

2. § 302

Section 301(b) establishes two successive sets of technology-based effluent limitations for pollutant discharges in (b)(1) and (b)(2). It requires more stringent limitations on pollutant discharges to a particular receiving water if the first level of technology-based standards does not achieve water quality standards for the receiving water, 33 U.S.C. § 1311(b)(1)(C). Section 302(a) accomplishes the same purpose if the second level of technology-based standards does not achieve water quality standards.

3. § 303

The primary approach to developing effluent limitations on pollutants discharged from point sources under all of these sections is to base them on the pollutant removal that various levels of technology can achieve. If technology-based effluent limitations do not remove enough pollutants to meet the desired quality of the receiving water, however, more stringent effluent limitations on pollutants are developed to meet water quality standards established for the receiving water. This second approach is required in §§ 301(b)(1)(C) and 302 and is based on § 303.

Section 303 requires states and EPA to establish water quality standards. Water quality standards consist of only two elements: 1) designated uses for receiving waters and 2) criteria necessary to support the designated uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.2(d), 130.3, 131.2(i) and 131.3. The designated use for a particular waterway may be the propagation of native fish. The criteria

supporting that use include limitations on the concentrations of pollutants in the waterway necessary to assure fish survival and propagation. Once the state develops these standards and EPA approves them, they become a part of federal law. *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1059 (1992). Water quality standards "serve the dual purposes of establishing water quality goals . . . and serving as the regulatory basis for establishment of water quality-based treatment controls . . . beyond the levels of treatment required by sections 301(b) and 306 of the Act." 40 C.F.R. § 130.3. After establishing water quality standards, the states and EPA are required by § 303 to determine water bodies where such standards are not being met. 33 U.S.C. §§ 1313(d)(1)(A) and 1314(c)(1)(A)(B). They are then required to determine the total amount of pollutants that can be present in those water bodies without violating the standards (the load or total maximum daily load). 33 U.S.C. §§ 1313(d)(1)(C), (2), (3). Finally, they are required to develop effluent limitations for point sources by allocating the permissible pollutant load between point sources and non-point sources that contribute the pollutant to the water body. 33 U.S.C. §§ 1313(d)(4), 1314(c)(1)(D). The preponderance of requirements in § 303 are for states and EPA to develop water quality standards and then to develop effluent limitations for point source discharges of pollutants in order to meet the standards. Significantly, the only aspect of § 303 with which a member of the regulated public can comply is an effluent limitation on a pollutant discharge. While such an effluent limitation is developed to achieve a water quality standard, the effluent limitation is not itself a water quality standard.

4. § 306

Section 306 requires EPA to develop a "standard of performance" for the control of the discharge of pollutants

from new sources. These standards are based on technologically achievable treatment, § 306(b)(1)(B), and are much the same as the technology-based effluent limitations required in § 301(b). Indeed, EPA promulgates them together with the § 301(b) technology-based effluent limitations. *See, e.g.,* 40 C.F.R. Pt. 415. *See also E.I. du Pont de Nemours & Co., supra*, 430 U.S. 112. Section 306 technology-based standards of performance do not differ materially from § 301(b) technology-based effluent limitations, except that they apply to new sources. They are restrictions on the amounts or concentrations of pollutants in a discharge.

5. § 307

Section 307 requires EPA to promulgate § 301(b) technology-based effluent limitations for various toxic pollutants and authorizes it to promulgate more stringent effluent standards for them under § 307(a). The effluent standards are to be based on the toxic effect of the pollutants, but still take the form of restrictions on the amounts or concentrations of the pollutants in a discharge. In addition, § 307(b) requires EPA to promulgate effluent standards to be met by industries discharging pollutants into municipal sewage treatment plants (so-called "indirect sources"). For the most part these standards are technology-based standards, analogous to the most stringent technology-based standards for toxics under § 307(b)(2). *Chemical Mfrs. Assn. v. NRDC*, 470 U.S. 116 (1985). Indeed, EPA routinely promulgates these so-called pretreatment standards together with its § 301(b) technology-based effluent limitations under 40 C.F.R. Pt. 415. There are, however, other types of pretreatment standards for indirect discharges that are not technology-based, 40 C.F.R. § 403.5, but they too are restrictions on the amounts or concentrations of pollutants in the indirect source's discharge.

All of these various requirements come together in § 402 permits for individual point sources. Section 402 permits incorporate effluent limitations on pollutants for individual discharges based on technology-based standards from §§ 301(b) and 306, on treatment necessary to achieve water quality standards from §§ 302 and 303 and on toxic effluent standards from § 307.

Thus, all of the listed sections in § 401(a)(1) are means of developing effluent limitations on pollutant discharges. They do so by different means, but the only requirements they establish for members of the regulated public are restrictions on the amounts or concentrations of pollutants in discharges. The certification condition on the flow rate of the Dosewallips River is not a restriction on a pollutant discharge, is therefore not an applicable provision of one of the listed sections, and is therefore not authorized by § 401.

C. The Supreme Court Of Washington Erred In Concluding That The Use Designation Of The Dosewallips River And The State Antidegradation Policy Were Water Quality Standards Applicable To The Discharge.

The Washington Supreme Court held that § 401 "requires states to certify compliance with water quality standards." Pet. App. 7a. There are two flaws in this conclusion. First, § 401 does not require states to certify compliance with state water quality standards; instead it requires certification that the discharge from a federally licensed activity "comply with the applicable provisions" of the listed sections of the CWA.

Second, water quality standards (water body use designations and supporting criteria) in themselves simply do not establish applicable requirements with which discharges

must comply or even can comply. Standing alone they provide only goals. 40 C.F.R. § 130.3. Goals are not requirements.⁶ Aside from establishing goals, water quality standards only provide the basis for establishing requirements with which discharges must comply. 40 C.F.R. § 130.3. But to establish such requirements, a total maximum daily loading ("TMDL") must be developed for a criterion in a water body and the loading must be allocated among contributing discharges. 40 C.F.R. § 130.7. This process could not lead to the type of requirement imposed in the Washington certification condition. That is because stream flow simply is not the sort of criterion contemplated by the CWA. Indeed, flow is not even a criterion of the Washington water quality standards. WAC 173-201-035, 047. Water quality criteria represent "a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). Stream flow represents water quantity, not water quality. TMDLs and effluent limitations derived from TMDLs are established for "pollutants." 40 C.F.R. § 130.7(c). Stream flow is not a "pollutant" as defined in § 502(6).⁷

⁶Nor are policies requirements. One of the two purported water quality standards on which the court below relied was the State's antidegradation provision, which describes itself as only a policy.

⁷The court below seeks to broaden water quality standards by focusing them on "pollution" rather than on "pollutants." Indeed, the two terms are different. "Pollutant" focuses on a cause of pollution: the constituents in a discharge to the receiving water, § 402(c). While the ultimate concern of water quality standards is the abatement of "pollution," the means used to abate it is to restrict "pollutant" discharges. Section 303 does not use the term "pollution," but directs EPA and the states to develop effluent limitations based on waste load allocation of "pollutants" under § 303(d). "Pollutant" does not subsume "pollution" in this regard. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982). In any event, the flow rate of a river or of a discharge is neither a "pollutant" nor "pollution."

This analysis might suggest that the state could at least impose a certification condition on the flow of the discharge from the proposed activity, if it had promulgated a flow criterion to support its Class AA use designation for the Dosewallips River. Such a suggestion would fail, however, since flow is not a criterion of water quality. It denotes quantity, not quality. If stream flow were considered a criterion of water quality standards, then stream flow would be allocated by state and federal water pollution control officials in the establishment of water quality management programs under § 303. This practice would be inconsistent with the century-long development of the law governing western water rights. If flow maintenance were considered part of water quality standards, state and federal water pollution control officials could then dictate how much stream flow could be allocated for irrigation and other off-stream purposes. This also would wreak havoc on the century-long development of western water rights.

If stream flow were considered part of water quality standards, every downstream state could control the allocation of water for off-stream use in upstream states. Section 401(a)(2) requires the federal licensing or permitting authority to condition its license to assure compliance with the water quality standards of downstream states and to deny a license or permit if they cannot be met. This would give downstream states a stranglehold on water use and allocation in upstream states that would make the parade of horrors foreseen in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) pale by comparison. It could also disturb allocations in interstate compacts and in cases of this Court.

The CWA deals with water quality, not water quantity. Water quantity involves a wholly different body of laws and regulations as is made clear in the specific policy statement of § 101(g) of the CWA that water quantity allocation is the

exclusive domain of the States. The author of § 101(g), Senator Wallop of Wyoming, explained:

It is designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other purposes. It does not interfere with the legitimate purposes for which the act was designed. . . .

Water quality and interstate movement is an acceptable Federal role and influence. But the States historic rights to allocate quantity, and establish priority of usage remains inviolate because of this amendment. This act remains an act to protect the quality of water and to protect critical wetlands in concert with the various States. In short a responsible Federal role.

123 Cong. Rec. S26762 (daily ed., Aug. 4, 1977) (Statement of Sen. Wallop).

IV. STREAM FLOW MAINTENANCE IS NOT A CONDITION AUTHORIZED BY § 401(d)

The Supreme Court of Washington seeks to avoid the lack of support in § 401(a)(1) for Washington's flow maintenance certification condition by relying on § 401(d). This reliance is unfounded for several reasons. First, the certification is required by § 401(a)(1), not by § 401(d). Subsection (d) merely establishes the content of the certification required by § 401(a)(1). Because § 401(a)(1)

establishes the bounds of the certification, *i.e.*, compliance with §§ 301, 302, 303, 306 and 307, the contents of the certification established by § 401(d) can go no further than the bounds established in § 401(a)(1). As demonstrated above, § 401(a)(1) does not authorize the State to set conditions on the stream flow of the Dosewallips River.

Neither § 401(a)(1) nor § 401(d) authorizes a minimum stream flow condition. Section 401(d) authorizes only "effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with [the listed CWA provisions and] any other appropriate requirement of State law" Thus, the only conditions that can be imposed are federal and state requirements to comply with "effluent limitations, other limitations or monitoring requirements." The latter is irrelevant to this case. "Effluent limitations and other limitations" are not used randomly here. They are words charged with meaning in the CWA, particularly in §§ 301, 302, 303, 306 and 307. They refer to variously derived restrictions on pollutant discharges to navigable waters, whose meaning becomes clear upon reviewing the specific list of CWA provisions for which conditions are authorized. "[A]pplicable effluent limitations and other limitations" under §§ 301 and 302 are restrictions on pollutants in discharges derived either to meet technology-based standards or to achieve water quality standards. 33 U.S.C. § 1311(b) and § 1312(a). "[S]tandard of performance" under § 306 is a technology-based standard restricting pollutants in discharges from new sources. 33 U.S.C. § 1316(a)(1). "[P]rohibition, effluent standard, or pretreatment standard" under § 307 means restrictions on or prohibitions against toxic pollutants in discharges, § 307(a), or in indirect discharges (discharges to municipal sewage treatment plants), § 307(b).

The phrase "other appropriate requirement of State law" is limited to "effluent limitations and other limitations." As used in the CWA, these terms refer to restrictions on pollutant discharges. The list of specific requirements preceding the general phrase enumerates the various types of restrictions established in the CWA for limiting pollutant discharges. Under the *ejusdem generis* principle of statutory construction, where general words follow specific words in a statutory listing, the general words must be confined to the class or subject of the preceding specific listing. 2A C. Sands, *Sutherland Statutory Construction*, § 47.17 (4th ed. 1984); *Cleveland v. United States*, 329 U.S. 14, 18 (1946). The application of this principle is particularly appropriate where, as here, the general phrase and the preceding listing of specific requirements are in a subordinate section, but the listing of specific requirements, without the general phrase, appears in and defines the governing section.

For all of the above reasons, the "other appropriate requirement of State law" on which § 401(d) certification conditions may be based, is a requirement establishing limitations on pollutant discharges to navigable waters. The stream flow maintenance condition, of course, is not such a requirement. This limitation on the types of "appropriate requirement[s] of State law" that may be the basis of certification conditions does not deprive that phrase of meaning. For instance, states may have effluent limitations and other limitations on a "discharge of pollutants" to navigable waters requiring § 402 permits in addition to and more stringent than those established in the CWA; and they may have limitations on a "discharge" to navigable waters not requiring § 402 permits for which there are no federal effluent limitations or other limitations. Such state laws are specifically preserved in § 510.

A broader reading of "other appropriate requirement of State law" is not necessary to give it meaning, is not consistent with the remainder of the CWA, leads to disharmony between the CWA and the FPA and invites intrusion of water quality regulation into water quantity allocation, a result specifically prohibited by § 101(g).

For all the above reasons, the WUWC respectfully urges the Court to reverse the judgment of the Supreme Court of Washington.

RESPECTFULLY SUBMITTED, this 16th day of November, 1993.

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No. 92-1911

Supreme Court, U.S.

FILED

NOV 16 1993

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

PUD No. 1 of JEFFERSON COUNTY
AND THE CITY OF TACOMA,
v. *Petitioners,*

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES,
AND DEPARTMENT OF WILDLIFE,
Respondents.

On Writ of Certiorari to the
Supreme Court of Washington

BRIEF OF *AMICUS CURIAE*
NIAGARA MOHAWK POWER CORPORATION
IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether Congress intended in section 401 of the Federal Water Pollution Control Act ("CWA") to authorize states to condition water quality certifications for federally licensed projects on provisions of state laws that were not promulgated as water quality standards under section 303 of the CWA and do not regulate the discharge of pollutants into navigable waters?

2. Whether Congress intended to permit states to utilize section 401 of the CWA to override the comprehensive and exclusive authority to balance the developmental, environmental and other aspects of hydroelectric development reserved by the Federal Power Act ("FPA") to the Federal Energy Regulatory Commission?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1911

PUD No. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,
v. *Petitioners,*

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES,
AND DEPARTMENT OF WILDLIFE,
Respondents.

On Writ of Certiorari to the
Supreme Court of Washington

BRIEF OF *AMICUS CURIAE*
NIAGARA MOHAWK POWER CORPORATION
IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

Niagara Mohawk Power Corporation ("Niagara") is a public utility that provides electric service to more than 1.5 million customers living or working within a 24,000 square mile area of New York State. In order to provide electricity to its customers at the lowest possible cost, Niagara maintains a diverse mix of generating units, utilizing a variety of different fuels to produce electricity. Niagara derives approximately 10 percent of its requirements of electric capacity and energy from 73 hydroelectric facilities that are subject to the licensing provi-

sions of Part I of the Federal Power Act. These hydroelectric facilities provide over 700 megawatts of capacity and constitute the lowest cost component of Niagara's energy resource mix. Niagara owns and operates more hydroelectric facilities subject to the FPA's hydroelectric licensing provisions than any other licensee.

Niagara's interests as a licensee under the FPA and the interests of its customers in preserving access to economical hydroelectric resources are directly and vitally affected by the instant case. Nine licenses issued by the Federal Energy Regulatory Commission ("FERC") or its predecessor, the Federal Power Commission ("FPC"), covering thirty of Niagara's hydroelectric developments, are due to expire on December 31, 1993. Niagara has filed applications with the FERC for new licenses for those projects and for initial licenses for other hydroelectric projects. In connection with those applications, Niagara has also applied to the New York State Department of Environmental Conservation ("NYSDEC") for certifications required by section 401 of the CWA, 33 U.S.C. § 1341. In addition, Niagara is regularly required by the FERC to undertake dam repair or reconstruction projects, some of which may also require state certification under section 401.

The NYSDEC has taken a view of its authority under section 401 that is as broad as that asserted by the Washington Department of Ecology ("WDEC") and upheld by the court below. The NYSDEC has asserted that it has authority under section 401 to subject Niagara's federally licensed hydroelectric projects to numerous provisions of New York law, even though it concedes that, by virtue of the FPA, it cannot require Niagara to apply for the state permits required by those state statutes.¹

¹ Declaratory Ruling 15-09, *stated in* Letter from Marc S. Gerstman, Deputy Commissioner and General Counsel of NYSDEC, to Brian K. Billinson, Senior Counsel of Niagara Mohawk (Aug. 27, 1990).

The NYSDEC has denied Niagara's applications for certification for the hydroelectric projects being relicensed, on the ground that Niagara's applications did not include sufficient information relevant to the application of the substantive requirements of state permitting statutes to those projects.²

The NYSDEC's sweeping view of its authority under section 401, if upheld, would subject Niagara to the requirements of state environmental regulatory schemes that duplicate and potentially conflict with the regulation of Niagara's hydroelectric facilities by the FERC. The result would be to delay implementation and increase the cost of dam maintenance and repair work required by the FERC. In addition, the cost of producing electricity from Niagara's hydroelectric projects (which costs are reflected in Niagara's rates to its customers) could be increased substantially, severely undermining the economic viability of these important resources.

Niagara has sought administrative review of the NYSDEC's denial of its applications for certification in connection with the projects being relicensed and has challenged the agency's interpretation of the scope of its authority in state court. The New York Court of Appeals recently struck down the NYSDEC's view of its authority as contrary to section 401.³

STATUTORY FRAMEWORK

A. Regulation under the Clean Water Act

1. *Effluent restrictions promulgated by EPA.* In the CWA, Congress enacted a comprehensive program for

² Letter from J. J. Sama, NYSDEC, to J. M. Audenson, Niagara Mohawk, re: Request for Water Quality Certification (Nov. 19, 1992).

³ *Niagara Mohawk Power Corp. v. New York State Dep't of Environ. Conservation*, No. 214 (N.Y. Nov. 11, 1993).

the control and abatement of water pollution that "anticipates a partnership between the States and the Federal Government" *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1054 (1992). The United States Environmental Protection Agency ("EPA") is directed to promulgate effluent restrictions applicable to different categories of sources of water pollution. These restrictions include effluent limitations restricting the discharge of pollutants under Sections 301 and 302 of the CWA, 33 U.S.C. §§ 1311, 1312; standards of performance applicable to the discharge of pollutants from new sources of water pollution under Section 306, 33 U.S.C. § 1316; and toxic and pretreatment effluent standards under Section 307, 33 U.S.C. § 1317.

2. *Water quality standards promulgated by states, subject to EPA review.* The CWA also defines a role for the states in controlling water pollution. In order to supplement the effluent restrictions established by EPA, section 303 authorizes the states to establish "water quality standards," consisting of "the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2). Water quality standards promulgated by the state must be reviewed and approved by EPA before they can take effect.⁴ EPA has issued regulations to implement its review of state water quality standards. 40 C.F.R. Part 131 (1992). Under those regulations, the "water quality criteria" specified in the state water quality standards must be "sufficient to protect the designated uses." 40 C.F.R. § 131.6(c) (1992). The regulations further provide that, "When the [water quality] criteria are met, water quality will generally protect the designated use." 40 C.F.R. § 131.3(b) (1992).

⁴ 33 U.S.C. § 1313(c)(3). If a State does not enact water quality standards that meet EPA's requirements, EPA may promulgate water quality standards for the State. 33 U.S.C. § 1313(c).

3. *The certification requirement for federally licensed projects.* Under section 401 of the CWA, an applicant for a federal license or permit authorizing an activity that may result in a discharge into navigable waters, must provide "a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of [Sections 301, 302, 303, 306 and 307 of the CWA]." 33 U.S.C. § 1341(a)(1). The state must act on a request for certification within a reasonable time of receipt (not to exceed one year), but if the state denies the certification within that time, the federal agency may not issue the license or permit. Section 401(d) also directs that a certification contain "effluent limitations, other limitations and monitoring requirements" necessary to ensure compliance with any applicable effluent restrictions promulgated by EPA under Sections 301, 302, 306, or 307 of the CWA and with "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). Any limitations and monitoring requirements imposed by the state under section 401(d) become conditions on the federal license or permit. *Id.*

B. Regulation under the Federal Power Act

Virtually all of Niagara's hydroelectric projects are subject to regulation under Part I of the FPA, which vests in the FERC comprehensive authority over the construction, operation, and maintenance of hydroelectric facilities located on the navigable waters of the United States. *See* 16 U.S.C. §§ 797(e), 817(1). In discharging this broad authority, the FERC is required to evaluate a wide range of often competing values to promote and protect the public interest in "the comprehensive development of national resources." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 181 (1946).

The FERC is directed to condition any hydroelectric license to ensure that the project is "best adapted to a

comprehensive plan for the adequate protection, mitigation and enhancement of fish and wildlife (including related spawning grounds and habitat) and for other beneficial public uses." 16 U.S.C. § 803(a)(1). The FERC must give such non-developmental interests "equal consideration" in licensing decisions. 16 U.S.C. § 797(e).

Section 10(j) of the FPA requires the FERC to solicit the recommendation of all interested state and federal agencies regarding the conditions to be included in a project's license, and to base the conditions that the FERC will impose on its licenses, pursuant to 16 U.S.C. § 803(a)(3), on its consideration of those recommendations.⁵ The FERC, however, retains ultimate authority to determine if, and under what conditions, a license will be issued. *California v. FERC*, 495 U.S. 490, 499 (1990).⁶

⁵ 16 U.S.C. § 803(j). The FERC's licensing regulations require applicants for initial or renewed hydroelectric licenses to consult with interested state and federal agencies, to provide those agencies with extensive information regarding a project's potential impact on the environment and the applicant's plans to mitigate those effects and to enhance natural resources, and to hold public meetings jointly with those agencies. 18 C.F.R. §§ 4.38(b) (1993) (pertaining to initial licenses), 16.8(b) (1993) (pertaining to relicenses). An applicant must also conduct, prior to filing its application, all reasonable studies requested by state and federal resource agencies that are necessary for the FERC to make an informed decision on the merits of the application, including studies relating to environmental impacts and mitigation measures. 18 C.F.R. §§ 4.38(c), 16.8(c) (1993). The application itself must include extensive reports and information compiled in consultation with resource agencies addressing numerous environmental issues, including the project's impacts on water quality, fish, wildlife, botanical resources, archeological resources, aesthetics, recreational and scenic values, and wetlands. 18 C.F.R. §§ 4.41(f), 4.51(f) (1993).

⁶ The FERC maintains continuing regulatory authority after a project is licensed to police compliance with license conditions and to address such issues as dam safety, maintenance and repair. Under the FERC's dam safety regulations, for example, a regional engineer (or other authorized agent of the FERC) subjects hydro-

SUMMARY OF ARGUMENT

The court below held that the "appropriate requirement of state law" clause in section 401(d) of the Clean Water Act "is a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates." Pet. App. 13a. On this basis, the court allowed the WDEC to impose conditions related to streamflow quantities for fish habitat. The expansive reading of state authority under section 401 adopted by the court below is contrary to the language and structure of the CWA and fails to give effect to Congress's determination that the FERC should exercise comprehensive authority over hydroelectric projects to promote the balanced development of water resources.

First, the language and structure of section 401 demonstrate that only a state law that regulates "discharges," used in the CWA to mean the addition of pollutants to navigable waters, constitutes an "appropriate requirement of state law" for the purposes of section 401(d). By its express terms, section 401 requires state certification only for federally licensed activities that may result in a discharge. Moreover, the specific provisions of the CWA enumerated in section 401(a)(1) as the bases for the exercise of the states' certification authority all regulate discharges of pollutants into navigable waters. There is no reason to read the states' authority to condition certifications, which is limited to those same provisions of the CWA and "appropriate" requirements of state law, so broadly as to override Congress's carefully crafted

electric projects to inspections for purposes of protecting the safety, stability and integrity of the project or otherwise protecting life, health or property. 18 C.F.R. § 12.4 (1993). As a result of these inspections, the FERC can "require an applicant or licensee to take any other action with respect to the design, construction, operation, maintenance, repair, use, or modification of the project . . . that is in the judgment of the regional engineer . . . necessary or desirable." *Id.*

limitations on the grounds upon which a certification may be denied.

To the contrary, in section 510 of the CWA, Congress expressly reserved the authority of the states to adopt and enforce standards or limitations "respecting discharges of pollutants" against preemption by the CWA. The "appropriate requirement" clause of section 401(d) serves a necessary and straightforward function by enabling a state to apply any discharge limitation it enacts by virtue of this reserved authority to federally licensed projects.

Second, the sweeping interpretation of section 401(d) adopted below ignores the comprehensive scheme of federal regulation of water power development established under the FPA. In the FPA, Congress gave the FERC exclusive and comprehensive authority to license hydroelectric projects, based on that agency's assessment of the appropriate balance among the developmental, environmental and other impacts and benefits of each project. As interpreted by the court below, section 401(d) would empower a state agency to supplant the role that Congress assigned to the FERC and to supersede FERC's balancing of all interests affected by a project, specifically including environmental interests. Indeed, under the decision below, state requirements touching in any way on water quality would not even be subject to the balancing mandated by the FPA. There is no indication that Congress intended in section 401 to empower state agencies to override the FERC's authority in this manner. The assumption of the court below to the contrary is belied by Congress's express reaffirmation of the paramount and preemptive authority of the FERC to balance all interests affected by hydroelectric projects *after* the enactment of section 401.

ARGUMENT

I. ONLY A STATE LAW THAT RESTRICTS THE DISCHARGE OF POLLUTANTS INTO NAVIGABLE WATERS CAN CONSTITUTE AN "APPROPRIATE REQUIREMENT OF STATE LAW" FOR PURPOSES OF SECTION 401.

The court below held that the state agency could impose streamflow conditions on its issuance of a certification under section 401, regardless of whether those conditions were necessary to assure compliance with a state-issued and EPA-approved water quality standard. Pet. App. 10a. The court found this authority to have been granted by the Congressional directive that any certification issued under section 401 set forth "any effluent limitations, and other limitations, and monitoring requirements" necessary to ensure compliance with limitations imposed under listed sections of the CWA, "and with any other appropriate requirement of State law." 33 U.S.C. § 1341(d). The court interpreted the last phrase to encompass "all state water-quality related statutes and rules, including, but not limited to, the water quality standards the state has adopted as required by section 303." Pet. App. 10a.

The Washington Supreme Court's expansive reading of state authority under section 401 is contrary to the plain meaning of the statute. The Washington Court's holding turned on the meaning of "appropriate," as used in section 401, but it interpreted that provision without reference to the language and structure of section 401 as a whole and the related operative provisions of the CWA. Had the court below properly focused on the language and structure of the statutory provision before it, it would have recognized that Congress intended a far narrower scope for the states' authority to condition section 401 certifications, and therefore federal licenses and permits.

A. The Language of Section 401(d) and the Structure of Section 401 Demonstrate That Only a State Law That Regulates the Addition of Pollutants to Navigable Waters Constitutes an "Appropriate Requirement of State Law."

In interpreting a federal statute, a court's task is to enforce the intent of Congress as expressed in the language of the statute. *See United States v. Ron Pair Enterprises, Inc.*, 498 U.S. 235, 241-42. (1989). Statutory interpretation must start with the text of the statute itself. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2594 (1992). "[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Id.* In determining whether Congress has spoken with clarity, the Court does not consider a word or phrase in isolation, but looks to the context in which it is used. "[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 113 S.Ct. 1993, 1996 (1993). *See also United States National Bank of Oregon v. Independent Insurance Agents*, 113 S.Ct. 2173, 2182 (1993); *Smith v. United States*, 113 S.Ct. 2050, 2054 (1993). In this case, although the word "appropriate" is ambiguous when viewed in isolation, the context in which it is used in section 401 of the CWA makes Congress's meaning clear. *See Smith*, 113 S.Ct. at 2054.

1. The context in which the "appropriate requirement" clause appears in section 401(d) makes it clear that the scope of the clause is limited to state restrictions on the discharge of water pollutants.

By the express terms of section 401(d), the states' conditioning authority attaches only to a "certification provided under this section."⁷ In identifying the provisions

⁷ Section 401(d) provides:

Any certification provided under this section shall set forth effluent limitations, other limitations and monitoring require-

of state law that are "appropriate" as conditions imposed on section 401 certifications, the court below should have begun by considering when such certifications are required. Pursuant to section 401(a)(1), a certification is required only for federally licensed activities that "may result in any discharge into the navigable waters." 33 U.S.C. § 1341(a)(1). A "discharge" is defined in the CWA to include both the "discharge of a pollutant" or "the discharge of pollutants," which terms are in turn defined to mean the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) and (16).⁸ Inasmuch as a certification is required under section 401 only for activities that may result in a "discharge," a requirement of state law may only be "appropriate" as a condition attached to a section 401 certification if it regulates "discharges," *i.e.*, the addition of pollutants to navigable waters by point sources.⁹

ments necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations or other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification.

33 U.S.C. § 1341(d).

⁸ A "pollutant" is defined in the CWA to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

⁹ The legislative history of section 401 emphasizes the restriction of the scope of that provision to "discharges." The Senate Report explains that section 401 substantially confirms existing law, amending it "to assure consistency with the bill's changed emphasis to . . . effluent limitations based on the elimination of any discharge of pollutants." S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971),

This natural reading of "appropriate" is consistent with the context in which the word appears in section 401(d). The "appropriate requirement of State law" clause follows a list of specific references to effluent restrictions imposed pursuant to four sections of the CWA. Each of those sections regulates discharges of pollutants, as that phrase is used in the CWA.¹⁰ Under the principle of *ejusdem generis*, the "appropriate requirement" clause is most reasonably construed to extend only to provisions of state law that impose similar restrictions on the pollutants that may be discharged by point sources into navigable waters. See *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 111 S.Ct. 1156, 1163 (1991); *Arcadia v. Ohio Power Co.*, 111 S.Ct. 415, 422 (1990).

While the canon of *ejusdem generis* is not controlling when the context of a statute dictates a different conclusion, *Norfolk & Western*, 111 S.Ct. at 1163, the language and structure of section 401 support its application here. By referring to "appropriate" requirements of state law, Congress plainly intended to limit the scope of the states'

reprinted in 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Cong., 1st Sess. 1487 (1973) [hereinafter "CWA Legislative History"]. See also H.R. Rep. No. 911, 92d Cong., 2d Sess. 121, reprinted in 1 *CWA Legislative History* at 808.

¹⁰ Section 301 declares unlawful "the discharge of any pollutant" and requires the Administrator of EPA to establish "effluent limitations for point sources." 33 U.S.C. § 1311. Section 302 similarly empowers the Administrator to establish effluent limitations whenever "discharges of pollutants from a point source or group of point sources" would cause specified hazards. 33 U.S.C. § 1312. Under section 306, the Administrator is directed to establish "standards of performance," which are defined as standards "for the control of the discharge of pollutants" from new sources. 33 U.S.C. § 1316. Finally, section 307 requires the Administrator to establish effluent limitations and pretreatment standards with respect to the discharge of toxic pollutants. 33 U.S.C. § 1317.

conditioning authority.¹¹ Reading the "appropriate requirement" clause to encompass "all state action related to water quality," as the lower court did (Pet. App. 13a) would place no effective limits on the states' conditioning authority. By the express terms of section 401(d), a requirement of state law can only be enforced in a water quality certification through "effluent limitations, other limitations and monitoring requirements." Virtually any state requirement that could be enforced through such means would bear some relationship to water quality. The lower court's interpretation thus gives no effect to the nature of "appropriate" as a modifier limiting the state requirements that could be enforced through a certification.¹²

2. The structure of section 401 supports giving a limited scope to the "appropriate requirements" clause of subsection (d).

Congress took pains in section 401 to define precisely the terms upon which a state could deny certification for a federally licensed or permitted project. Under section 401(a)(1), a state can deny certification only if a discharge from a federally licensed project will not comply with the applicable provisions of one of five listed sections of the CWA.¹³ Four of the enumerated sections authorize

¹¹ Cf. *Mertens v. Hewitt Associates*, 113 S.Ct. 2063, 2069 (1993) (provision authorizing a court to award "such other equitable relief as the court deems appropriate" does not extend to all relief historically available at equity).

¹² See *id.* at 2069 ("We will not read the statute to render the modifier superfluous."). Compare *Norfolk & Western*, 111 S.Ct. at 1163-64 (the phrase "all other law, including State and municipal law" cannot be limited by application of *ejusdem generis* because of the textual indicia that a broad sweep was intended).

¹³ Section 401(a)(1) requires an applicant for a Federal license or permit authorizing an activity that may result in a discharge into navigable waters, to provide a State certification "that any such discharge will comply with the applicable provisions of sections [301, 302, 303, 306 and 307 of the CWA]." 33 U.S.C. § 1341(a)(1).

the Administrator of EPA to promulgate restrictions on discharges of pollutants by point sources. *See supra* n.10. The remaining provision, section 303, authorizes the states to promulgate water quality standards. Even those state-promulgated provisions require approval by EPA before they may take effect. 33 U.S.C. § 1313(c). Not only does section 401(a)(1) confirm the limitation of state authority under section 401 to the regulation of "discharges" from federally-licensed or permitted projects, it makes it clear that Congress gave the states the power to enforce only federally-promulgated or approved effluent restrictions and water quality standards against those projects.

Congress did not authorize the states in section 401(a)(1) to veto federal licenses or permits on the basis of other state requirements that were not presented to EPA for approval. Reading the "appropriate requirement" clause of section 401(d) to include all state laws touching on water quality would eviscerate the circumscribed limits of state authority under section 401(a)(1). Under the reading of section 401(d) adopted by the Washington Supreme Court, a state agency could impose onerous conditions on a certification that would be tantamount to vetoing a federal license or permit on grounds that do not regulate discharges of pollutants into navigable waters and that fall outside the state's water quality standards, the only legitimate basis for denying a certification under section 401(a)(1). *See Niagara Mohawk Power Corp.*, slip op. at 10.

In contrast, reading the "appropriate requirement" clause of section 401(d) to refer to state-promulgated restrictions on the addition of pollutants to navigable waters follows from the context in which the clause is used in section 401(d) and harmonizes the subparts of section 401. *Cf. Estate of Cowart*, 112 S.Ct. at 2595; *Freytag v. C.I.R.*, 111 S.Ct. 2631, 2638 (1991). A state may deny certification under section 401(a)(1) only for non-compliance with an applicable discharge-related require-

ment promulgated by EPA pursuant to one of the listed provisions of the CWA or with an applicable water quality standard promulgated by the state (and approved by EPA) under section 303. It may add effluent limitations and monitoring conditions to its certification pursuant to section 401(d) only as necessary to ensure compliance with those same requirements, or with provisions of state law that impose similar restrictions on the pollutants that may be discharged by point sources into navigable waters.

B. The "Appropriate Requirement" Clause Was Included in Section 401 To Subject Federally Licensed Projects to State Restrictions on Discharges of Water Pollutants.

The Congressional purpose in including the "appropriate requirement" clause in section 401(d) to authorize the states to condition section 401 certifications on compliance with state-promulgated restrictions on the discharge of pollutants may be readily discerned by reference to a related provision of the Act. Section 510 of the CWA provides that nothing "in this chapter," referring to the CWA, "shall preclude or deny the right of any State . . . to adopt or enforce . . . any standard or limitation respecting discharges of pollutants," provided that the state restriction is at least as stringent as any applicable federal requirements. 33 U.S.C. § 1370.

Section 510 reflects the desire of Congress not to restrict the states' flexibility to adopt more protective restrictions on the discharge of pollutants into navigable waters.¹⁴ That section is not, however, sufficient in itself to permit the states to enforce uniformly any "standard or limitation respecting the discharge of pollutants." Although section 510 reserved the states' authority to set more stringent discharge restrictions against preemption

¹⁴ *See* H.R. Rep. No. 911, 92 Cong., 2d Sess. 136, reprinted in 1 CWA Legislative History at 823.

by the CWA, it is silent with respect to other federal statutes. Congress evidently recognized that, in the absence of an express Congressional grant of authority, enforcement of any such state discharge limitation against a federally licensed project could be preempted by a comprehensive federal licensing statute, such as the FPA. *Cf. First Iowa*, 328 U.S. at 175, 181 (holding that although section 27 of the FPA "saved" certain state laws relating to property rights as to the use of water, the states' exemption from preemption was limited to that specific subject area).

Read in the context of the related provisions of the CWA, the "appropriate requirement" clause of section 401(d) serves a necessary and straightforward function. The clause was necessary to eliminate the immunity that federally-licensed projects could otherwise enjoy from state limitations "respecting discharges of pollutants" enacted pursuant to the authority reserved under section 510. The language and structure of section 401 afford no basis for reading the "appropriate requirement" clause to extend beyond state-enacted requirements "respecting discharges of pollutants" that are permissible under section 510.

C. The Court Below Disregarded the Language of Section 401 and Misread the Section's Legislative History.

1. The court below ignored the complex regulatory scheme Congress crafted to achieve its objective.

In adopting an expansive reading of the "appropriate requirement" clause, the Washington Supreme Court undertook no analysis of the language and structure of section 401. It looked instead to the general objective of the CWA, as stated in 33 U.S.C. § 1251(a), of "restor[ing] and maintain[ing] the . . . integrity of the Nation's waters." Pet. App. 11a. While the ultimate objective of a statute is appropriately taken into account in interpreting the lan-

guage chosen by Congress, the court below failed to recognize that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens*, 113 S.Ct. at 2071 (emphasis in original). This principle is "especially true with . . . an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests" *Id.*

In the CWA, Congress indeed enacted a complex regulatory scheme through which it sought to achieve its ultimate purpose. That regulatory regime envisions roles both for the federal government and for the states in achieving Congress' objective. *Arkansas*, 112 S.Ct. at 1054. Congress thus determined the division of authority that, in its judgment, would be most effective in "restoring and maintaining the . . . integrity of the Nation's waters." The role of a court interpreting provisions of the statute that effect that division is not to revise that allocation of responsibility, based on its own views of how best to achieve the purpose of the statute, but to give effect to the choice that Congress made and expressed in the language of section 401. *See Niagara Mohawk Power Corp.*, slip op. at 11. The expansive reading of the "appropriate requirement" clause of section 401(d) adopted in the decision below disregards the context in which the clause appears and fails to consider how section 401(d) functions within section 401 and in the overall context of the CWA.

2. The court below misread the legislative history of section 401.

The court below also purported to rely on the legislative history of section 401(d), stating that the inclusion of a reference to section 303 (the water quality standards provision) in subsection (a)(1) of section 401, in conjunction with its omission from subsection (d), must mean that the conditioning authority in the latter subsection was intended to extend beyond the scope of the certification authority under the former. Pet. App. 12a. This

argument is based on a fundamental misreading of the legislative history.

As enacted in 1972, neither subsection (a)(1) nor subsection (d) of section 401 included a reference to water quality standards or to section 303. Pub. L. No. 92-500, § 2, 86 Stat. 877. Subsection 401(a)(1) was amended to add a reference to section 303 in 1977. The Senate Report explained the purpose of the amendment as follows:

The Congress intended in 1972 that State water quality standards would be imposed through section 301, and thus certification by the State would include consideration of the water quality standards. The failure to explicitly include reference to section 303 has led to confusion, however, as to whether certification of compliance with water quality standards was required. This amendment follows the original congressional intent and clarifies that.

S. Rep. No. 370, 95th Cong., 1st Sess. 72-73 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4397-98. To implement this change, Congress inserted "303" in the "phrase 301, 302, 306, or 307 of this Act" wherever those phrases appeared in section 401. Pub. L. No. 95-217, § 64, 91 Stat. 1599. This clarification modified subsection (a)(1) of section 401, but did not modify subsection (d), even though all four sections were referred to, because the listing is broken up by explanatory phrases. *See supra* n.7.

The court below erred, however, in reading some purpose into this apparent oversight. The conference committee explained that Congress intended no such distinction:

It is understood that section 303 is required by the provisions of section 301. Thus, the inclusion of section 303 in section 401 while at the same time not including section 303 in other sections of the Act, where sections 301, 302, 306 and 307 are listed is in no way intended to imply that 303 is not included by

reference to 301 in those other places of the Act. . . . *Section 303 is always included by reference where section 301 is listed.*

H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 96 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4471 (emphasis added). No inference can properly be drawn from the omission of section 303 from subsection (d) of section 401, since that section was already included by reference due to the listing of section 301.

II. THE STATE COURT'S SWEEPING INTERPRETATION OF SECTION 401 OF THE CWA CONFLICTS WITH CONGRESS'S DELEGATION OF COMPREHENSIVE AUTHORITY OVER HYDROELECTRIC PROJECTS TO THE FERC TO PROMOTE THE BALANCED DEVELOPMENT OF WATER RESOURCES.

The Washington Supreme Court's expansive interpretation of the states' authority to condition water quality certifications on compliance with any requirement of state law "related to water quality" (Pet. App. 13a) would vest the states with final authority over the critical environmental issues associated with the development of hydroelectric facilities. Affording such broad authority to state agencies would, however, interfere with Congress's determination in the FPA that the Nation's water power resources should be developed in a comprehensive manner that balances the developmental benefits and environmental consequences of hydroelectric projects, subject to exclusive regulation by the FERC.

A. Congress Gave the FERC Plenary Authority To Regulate Hydroelectric Projects in Order To Promote the Balanced Development of Water Power Resources.

Under the FPA, the FERC is empowered to issue licenses for the development of hydroelectric projects. 16 U.S.C. § 797(e). Under Section 10, a license must be conditioned so that the project:

will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses.

16 U.S.C. § 803(a)(1).

This Court has recognized that the FPA from its very beginning was intended to consolidate and coordinate the regulation of hydropower projects under the control of a single federal agency in order to bring about the development of the hydroelectric potential of the Nation's water resources in a balanced manner. In *First Iowa Hydro-Elec. Coop. v. FPC*, the Court noted that the FPA "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, insofar as it was within the reach of the federal power to do so" 328 U.S. at 180. The Court explained that "Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power" *Id.* at 174. On this basis, the Court concluded that an applicant for a hydroelectric license need not comply with state permitting requirements. *Id.* at 166-67. The Court recently reaffirmed this assessment of the regulatory scheme by rejecting a state agency's attempt to impose on a hydro-power project minimum streamflow conditions that were higher than the minimum streamflow conditions imposed by the FERC in its license. *California*, 495 U.S. at 496.

While Congress's purpose in the FPA was to promote the development of water power, it did not intend the environmental consequences of hydroelectric development to be ignored. To the contrary, this Court has recognized

that, as originally enacted, the FPA required that licensing decisions balance developmental and environmental concerns. *Udall v. Federal Power Commission*, 387 U.S. 428 (1967). The Court held such a broad inquiry to be part and parcel of the Commission's charge under the FPA to protect the public interest, which requires:

an exploration of all issues relevant to the "public interest," including future power demand and supply, alternative sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.

Id. at 450.

In 1986 (after the enactment and most recent amendment of section 401 of the CWA), Congress enacted the Electric Consumers Protection Act ("ECPA"), Pub. L. No. 99-495, 100 Stat. 1243, primarily to reaffirm the duty of the FERC to balance all aspects of hydroelectric developments in its licensing decisions. Section 4(e) of the FPA was amended by the ECPA to require the FERC to:

give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

16 U.S.C. § 797(e).¹⁵ In addition, the ECPA amendments added section 10(j) to the FPA to require the FERC to solicit the recommendations of all interested state and federal agencies (referred to as "resource agencies") regarding the conditions to be included in a proj-

¹⁵ The corresponding language in section 10(a)(1) of the FPA, quoted *supra*, was inserted by the ECPA.

ect's license, and to base the conditions that the FERC will impose on its licenses on its consideration of those recommendations. 16 U.S.C. § 803(j).

The ECPA thus confirmed the FPA's initial mandate by requiring the FERC to give "equal consideration" to environmental impact and other non-power concerns in its licensing decisions, while enhancing the opportunities for state resource agencies to participate in FERC proceedings implementing that responsibility. The ECPA nevertheless preserved the FERC's paramount authority over all aspects of hydroelectric development. Congress made clear that it intended to preserve the FERC's discretion to accept or reject the recommendations of state and federal resource agencies:

The provision is intended to stress the expertise of these agencies and the need for FERC to rely on them. Section 10(j) does not give such agencies a veto nor does it give them mandatory authority.¹⁶

The FPA reflects Congress's desire to bring about the development of the Nation's water power resources in a manner that balances developmental and environmental considerations. To achieve this end, Congress gave paramount and exclusive authority over all aspects of hydroelectric authority to a federal agency and prohibited state regulation of federally licensed hydroelectric projects except to the extent that state authority was expressly preserved. This Court summarized both the nature of the FERC's authority under the FPA and the basis for the

¹⁶ H.R. Conf. Rep. No. 99-934, 99th Cong., 2d Sess. 23 (1986), reprinted in 1986 U.S.C.C.A.N. 2540. See also *U.S. Department of Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992) (rejecting contentions that Federal and State resource agencies could order FERC to conduct environmental studies as part of the agencies' recommendation authority under Section 10(j)); *State of California v. FERC*, 966 F.2d 1541, 1550 (9th Cir. 1992) ("'[E]qual consideration' does not dictate FERC's acceptance of the result proposed by the fish and wildlife agencies.").

prohibition of duplicative state regulation in *California v. FERC*:

As Congress directed in FPA § 10(a), FERC set the conditions of the license after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination.

495 U.S. at 506-07.

B. The Washington Supreme Court's Interpretation of Section 401 of the CWA Conflicts With the Federal Regulatory Scheme of the FPA.

This Court has stated that a federal statute should, wherever possible, be interpreted so as to give effect to the provisions of other enactments touching on the same subject matter. See *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). The Washington Supreme Court failed to interpret section 401 of the CWA in a manner consistent with the requirements of the FPA. Rather, its interpretation of section 401 of the CWA conflicts with the fundamental aspects of the comprehensive regulatory scheme enacted in the FPA.

First, as explained above, the FPA requires that, in fashioning the conditions upon which a hydroelectric project will be permitted to go forward, the power and other developmental benefits of the project be balanced against the environmental consequences of its development. The decision below, in contrast, gives states the authority, and imposes on them the obligation,¹⁷ to condition section 401

¹⁷ The language of section 401(d) is mandatory, stating that section 401 certifications "shall set forth" conditions necessary to ensure compliance with the requirements that fall within the scope of the provision.

certifications to ensure compliance with all requirements of state law that are in any way related to water quality. Pet. App. 13a. Considerations related to water quality, as reflected in state laws and regulations that are not subject to federal oversight, are thus removed from the balancing required by sections 4(e) and 10(a) of the FPA and are elevated to paramount importance. Moreover, states have taken an expansive view of those provisions of state law that they believe are somehow "related to water quality."¹⁸ The expansive reading of section 401 adopted by the court below effectively permits states to duplicate the comprehensive review undertaken by the FERC, in a manner that exempts environmental considerations from the balancing mandated under the FPA.¹⁹

Second, the Washington Supreme Court's interpretation of section 401 conflicts with the Congressional determination in the FPA to vest final authority in a federal agency, the FERC, to balance all interests affected by hydroelectric development. Not only would the court below exempt environmental considerations from the balancing required by the FPA, it would make it the responsibility of the state certifying agency to determine how to apply the state environmental requirements to the federally li-

¹⁸ In New York, for example, the NYSDEC has taken the position that state statutes governing dam repair and dam safety, as well as those relating to the recreational and municipal use of water, and the protection, preservation and propagation of fish and wildlife are related to water quality and therefore, under the interpretation of section 401 adopted by the court below, must be enforced in a section 401 certification regardless of their impact on the economic viability of a hydroelectric project. Gerstman, *supra* n.1.

¹⁹ In New York, the NYSDEC has taken the view that the "appropriate requirement" clause of section 401(d) authorizes it to conduct a full scale review of a hydroelectric project under the State Environmental Quality Review Act and to impose conditions on a certification as necessary to mitigate any adverse environmental impacts of the project, regardless of the FERC's view of the appropriateness of those mitigation measures. *Id.*

censed project. This substitution of state authority for federal authority would subvert the intent of Congress. As this Court has recognized, "[t]he detailed provisions of the [FPA] providing for the federal plan of regulation leave no room or need for conflicting state controls." *First Iowa*, 328 U.S. at 181. See also *California*, 495 U.S. at 506-07. The Court explained:

Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the "comprehensive" planning which the Act provides shall depend on the judgment of the Federal Power Commission or other representatives of the Federal Government.

First Iowa, 328 U.S. at 164.

The Washington Supreme Court's reading of section 401 amounts to a determination that Congress intended in that section to repeal the FPA's grant of exclusive and preeminent regulatory authority over hydroelectric development to the FERC. Not only are repeals by implication generally disfavored, see *Watt*, 451 U.S. at 266-67, but the development of the CWA and the FPA make it clear that none was intended here. As explained above, when Congress enacted the ECPA (over a decade after the enactment of the section 401), it required the FERC to consider state agencies' recommendations with respect to hydroelectric license conditions. Congress did not, however, require the FERC to accept state agencies' recommendations. Congress certainly did not give the states the authority themselves to establish the licensing conditions appropriate to protect fish and wildlife. This effort to preserve the FERC's final authority would have been pointless if the states already had the broad powers that the Washington Supreme Court found under section 401 of the CWA. As this Court has recognized:

By directing FERC to consider the recommendations of state wildlife and other regulatory agencies while providing FERC with *final authority* to establish li-

cense conditions (including those with terms inconsistent with the States' recommendations), Congress has amended the FPA *to elaborate and reaffirm First Iowa's understanding that the FPA establishes a broad and paramount federal regulatory role.*²⁰

The court below made no attempt to read the states' authority under section 401 in a manner that avoids undermining the regulatory scheme of the FPA. The unsupported interpretation of section 401 adopted by the Washington Supreme Court would "fundamentally . . . restructure a highly complex and long enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process." *California*, 495 U.S. at 500. As explained above, a construction that preserves the authority of the FERC, while affording a meaningful role to state water pollution control efforts was available and, indeed, is compelled by the text and structure of the CWA. Section 401 should be read to empower states to condition water quality certifications as necessary to ensure compliance with the listed provisions of the CWA, including state-promulgated water quality standards, and with state restrictions on the addition of pollutants to navigable waters. Outside of the sphere of authority expressly reserved to the states under section 401, the Congressional determination that the FERC determine how best to balance all interests affected by hydroelectric developments should be given effect.

²⁰ *California*, 495 U.S. at 499 (emphasis added). See also *Sayles Hydro Associates v. Maughan*, 985 F.2d 451, 456 (9th Cir. 1993) ("There would be no point in Congress requiring the federal agency to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves.").

CONCLUSION

For the reasons stated above, the decision of the Washington Supreme Court should be reversed.

Respectfully submitted,

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DEC 14 1993

THE CLERK

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1993

**PUD No. 1 of JEFFERSON COUNTY
 AND THE CITY OF TACOMA,**
Petitioners,

v.

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
 DEPARTMENT OF FISHERIES AND
 DEPARTMENT OF WILDLIFE,**
Respondents.

On Writ of Certiorari to the
 Supreme Court of the State of Washington

**BRIEF OF AMICI CURIAE AMERICAN RIVERS,
 THE AMERICAN FISHERIES SOCIETY, THE COAST
 RANGERS ASSOCIATION, THE CONSERVATION LAW
 FOUNDATION, THE FEDERATION OF FLY FISHERS,
 FRIENDS OF THE EARTH, THE NATIONAL AUDUBON
 SOCIETY, THE NATURAL RESOURCES DEFENSE
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 OLYMPIC PARK ASSOCIATES, THE OLYMPIC RIVERS
 COUNCIL, THE PACIFIC COAST FEDERATION OF
 FISHERMEN'S ASSOCIATIONS, THE RIVERS
 COUNCIL OF WASHINGTON, SALMON FOR ALL,
 THE SIERRA CLUB, TROUT UNLIMITED,
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IN THE
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No. 92-1911

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COUNCIL OF WASHINGTON, SALMON FOR ALL,
THE SIERRA CLUB, TROUT UNLIMITED,
THE WASHINGTON ENVIRONMENTAL COUNCIL
AND THE WASHINGTON TROLLERS ASSOCIATION
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

Amici are a collection of organizations that share a strong interest in preventing further decline of this Nation's aquatic resources. They fall into a number of different categories. First, the American Fisheries Society is the world's oldest and largest scientific body dedicated to the advancement of fisheries science and the conservation of renewable aquatic resources. Second, several organizations represent the commercial fishing industry: the Pacific Coast Federation of Fishermen's Associations (which, in turn, has member affiliates from San Diego to Alaska representing several thousand individual working-family fishers), Salmon for All, and the Washington Trollers Association. The Federation of Fly Fishers is a national organization of sport fishers. Yet another group of *amici*—typified by American Rivers—consists of conservation groups that focus their efforts on the preservation of this Nation's rivers and other waterways.¹ Finally, a number of *amici*—typified by the 600,000-member Sierra Club—combine this concern with broader efforts to protect the natural environment.²

All of the *amici* have a commitment to the revitalization of the anadromous fishery of the Pacific coast and to the preservation of the Nation's aquatic resources as a whole. They are concerned that this effort would be compromised if this Court were to rule that states may not, when they are asked to issue certifications under section 401 of the Clean Water Act, 33 U.S.C. § 1341, take into account the potentially devastating impact on

¹ Others in this group are New York Rivers United, the Olympic Rivers Council, the Rivers Council of Washington, and Trout Unlimited.

² Other groups in this final category are the Coast Range Association, the Conservation Law Foundation, Friends of the Earth, the National Audubon Society, the Natural Resources Defense Council, Olympic Park Associates, and the Washington Environmental Council.

fish caused by diversions of water through hydroelectric projects.

SUMMARY OF ARGUMENT

1. This case concerns the scope of the power granted to states under section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, which requires a state certification of compliance with various provisions of the Act before a federal agency may issue a license or permit for any activity that may involve a discharge into navigable waters. Petitioners argue that the state review in this case should not have extended to the issue of minimum stream flow because that issue will be considered by the Federal Energy Regulatory Commission ("FERC") when it considers licensing their hydroelectric project. But the same argument could be made with respect to *any* water-quality issue that a state might consider, because there is always a potential overlap with FERC's decisionmaking. That potential for overlap is irrelevant, since Congress plainly intended a dual, state/federal review of these issues.

2. Section 401 requires states to determine whether "discharges" resulting from federally licensed projects will comply with various provisions of the Act and with each state's federally mandated Water Quality Standards. 33 U.S.C. § 1341(a), (d). The statutory language, the legislative history, and administrative interpretations of the Act all indicate that the term "discharge" was to have a broad meaning, going beyond discharges of "pollutants" from "point sources" to include most if not all of the other forms of "pollution" recognized in the Act. One such form of pollution is "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, or flow diversion facilities." *Id.* § 1314(f)(2)(F).

Once the breadth of the term "discharge" is understood, it becomes apparent that there are at least two discharges that are both features of petitioners' project

and directly linked to the particular violation that the State sought to prevent. One is the construction of the dam itself, which will involve the pouring into the river of large amounts of concrete and other materials. The appropriateness of treating the dam itself as a "discharge" is confirmed by another section of the CWA, section 404, 33 U.S.C. § 1344, which uses the more specific term "discharge of dredged or fill material." The applicable regulations specifically define this narrower category of discharges as including construction of dams. 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2(f). It follows that the broader term "discharge" in section 401 must also include dam construction, and it is this "discharge" that will cause the diversion of water degrading the river as a fishery.

Moreover, another relevant discharge will be the emission of *non-diverted* water through the dam's sluice gate or spillway. This discharge as well is directly linked to the harm that the State sought to prevent, because that harm results from the low volume of this discharge.

3. The State was not limited to considering only those impacts of the dam that would conflict with a specific "criteria" listed in its federally mandated Water Quality Standards. The Standards specifically reflect "use" of the Dosewallips River as a habitat for salmon and other fish. Moreover, they include (as required by federal regulations) a flat prohibition of any degradation of any existing beneficial use. The State here determined that the Elkhorn project would, absent minimum stream flows at the level specified by the State, degrade the use of the river as a fishery. It therefore had the power and duty to prevent such degradation when petitioners sought a certification under section 401.

In any event, section 401(d) also authorizes states to impose conditions on their certifications that serve to enforce "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). This phrase must at least include state laws that serve to protect water quality and prevent degradation of uses. Here, the State of Washington had

such a law in place—Wash. Rev. Code § 90.54.020(3)(a) (1992), which requires retention of "base flows" needed to preserve fish and other wildlife. This law provided an alternative basis for the State's action in this case.

4. This case does not involve an unwarranted extension of the Clean Water Act into a new realm, where it will interfere with state water laws or with FERC's role as regulator of the electric-power industry. Allowing *states* to address minimum stream flows (rather than giving FERC exclusive control) can hardly be deemed an intrusion on state control over water allocation. Moreover, no existing water right is threatened in this case. In any event, while the CWA does contain provisions addressing this concern, *see* 33 U.S.C. §§ 1251(g), 1370(2), those provisions are properly interpreted as only requiring an accommodation of state regimes for water allocation where this is possible, consistent with the protection of water quality.

As for the potential for interference with FERC's role, Congress plainly did not intend to give FERC the authority to make a policy judgment favoring a project that would violate State Water Quality Standards by degrading existing beneficial uses. Any balancing of competing policies by FERC is constrained by the requirement that these Standards be respected, and that requirement is enforced by giving states the certification power under section 401.

ARGUMENT

Under section 401 of the CWA, any applicant for a federal permit to conduct an activity that may result in a discharge into navigable waters is required to obtain a state certification of compliance with various specified provisions of the Act. Petitioners argue that section 401 did not authorize the State of Washington to condition its certification of the Elkhorn project on preservation of the stream flow at the level needed to protect the "existing use" of the Dosewallips River as a habitat for salmon

and steelhead trout. In reality, however, *all* of the usual tools of statutory construction—including the statutory language, the structure and purpose of the Act, and its legislative history—point in the opposite direction. Indeed, as we demonstrate below, the Environmental Protection Agency (“EPA”), which administers the Clean Water Act, has repeatedly addressed the issues presented here and has concluded that states do have the power under section 401 to protect fisheries from diversions of water caused by hydroelectric and other projects. It follows that there is no reason to reverse the ruling of the Supreme Court of Washington.

I. THE ISSUE IN THIS CASE IS NOT THE AUTHORITY EXERCISED BY FERC BUT THE AUTHORITY GRANTED TO STATES UNDER THE CLEAN WATER ACT.

The actions of the State of Washington challenged in this case were undertaken pursuant to a federal statute, section 401 of the CWA, which specifically requires state certification of compliance with other provisions of the Act before any federal agency can proceed to license an activity that may involve a discharge into navigable waters. In such a case, Congress plainly intended a *dual* state/federal regulatory process. Moreover, in creating that process, Congress in no way suggested that states are barred from addressing the same environmental concerns that also play a role in the relevant federal agency’s licensure determination.

Petitioners invite this Court to treat the case as if it involved a preemption question like the one presented in *California v. FERC*, 495 U.S. 490 (1990). Pointing to language in the Federal Power Act (“FPA”), 16 U.S.C. § 797(e), they begin and end their argument by suggesting that states’ authority under section 401 should be limited in order to preserve FERC’s supposedly “comprehensive” control over hydroelectric projects in general and over “minimum stream flows” in particular. Br. at 19-21,

46-49. But the FPA would only have controlling significance in this case if there were some inconsistency between that statute and the Clean Water Act. If that were true, there would indeed be a need to “harmonize” the two acts.

The reality is quite different. Congress in the FPA did give to FERC the primary role in licensure of hydroelectric projects. See 16 U.S.C. § 797(e). But it also gave independent roles to various other regulatory bodies. Thus, for example, where a project is within an Indian reservation, the FPA itself requires FERC to include in the license “such conditions as the Secretary [of the Interior] shall deem necessary for the adequate protection and utilization of such reservation.” *Ibid.*; see *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772-79 (1984). Similarly, a party seeking to construct a hydroelectric project must obtain, in addition to a FERC license, a permit under section 404 of the CWA, 33 U.S.C. § 1344, which requires the Army Corps of Engineers to consider the environmental impacts of any “discharge of dredged or fill material into the navigable waterways.” See *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 45-46 (D.C. Cir.), *cert. denied*, 484 U.S. 816 (1987). Finally, the Federal Land Policy and Management Act requires that a right of way be issued by the Bureau of Lands Management or the Forest Service for any FERC-licensed electric power project on public lands, see 43 U.S.C. § 1761(a)(4), and these other agencies may impose conditions designed “to assure that the use . . . would not substantially degrade the natural and cultural resources of the affected lands,” H.R. Rep. No. 474(VIII), 102d Cong., 2d Sess. 153 (1992).

State certification under section 401 is simply one more part of the approval process, applicable to all projects that require federal permits and may involve discharges—including hydroelectric projects licensed by FERC. Indeed, Congress, when it enacted section 401, specifically antici-

pated that this provision could be used to block hydroelectric projects within the jurisdiction of FERC's predecessor, the Federal Power Commission. The Senate Report on the Federal Water Pollution Control Act Amendments of 1972 recognized the "authority of the State . . . to act to deny a permit and thereby prevent a Federal License or permit from issuing to a discharge source within such State," adding that "[s]hould such an affirmative denial occur no license or permit could be issued by such Federal agencies as the . . . Federal Power Commission . . . unless the State action was overturned in the appropriate courts of jurisdiction." S. Rep. No. 414, 92d Cong., 1st Sess. 69 (1971). It follows that it would make no sense to limit the scope of state authority under section 401 in order to protect a perceived paramount role supposedly reserved for FERC.

Indeed, such a theory would lead to absurd results. It would mean that the language of section 401 would take on different meanings (*i.e.*, authorize different types or degrees of state review) depending on whether section 401 is triggered by a FERC license application or, instead, by an application under some other federal statute, such as the Atomic Energy Act, *see* 42 U.S.C. § 5843 (requiring Nuclear Regulatory Commission approval for nuclear power generation facilities), or the River and Harbor Act of 1899, *see* 33 U.S.C. § 401 (requiring a permit from the Army Corps of Engineers for any structure built in navigable waters).

More fundamentally, it cannot matter that there is an overlap between the issues that a state considers under section 401 and the issues that FERC considers in licensing a hydroelectric project under the FPA. After all, *any* water-quality concerns that a state might consider in response to a certification request, including those that petitioners would concede are proper, must, of necessity, have at least some limited overlap with FERC's open-ended mandate to weigh all aspects of a project's environ-

mental impact (along with other factors) under the FPA.³ Thus, if states were barred from rejecting or conditioning certifications based on factors that might later be considered by FERC, section 401 would effectively be left with no role to play in the process for approval of hydroelectric projects. Even petitioners do not claim that this outcome would make any sense. *Cf. Escondido Mut. Water Co.*, 466 U.S. at 776-77 (upholding the independent authority of the Secretary of the Interior to impose conditions on FERC licenses in order to protect Indian reservations, even though FERC was simultaneously required to consider the same issue).

In sum, in deciding this case, the proper place to begin and end the analysis is with the CWA itself. That federal statute gave the states the power and duty to certify the legality of proposed federally licensed projects. If this certification requirement, as a general rule, encompasses a project's impact on a waterway's "existing use" as a fishery, there is no basis for applying a different rule in cases like this one, involving hydroelectric projects.

II. THE REFERENCES TO "DISCHARGES" IN SECTION 401 IN NO WAY PRECLUDE STATE CONSIDERATION OF MINIMUM STREAM FLOWS IN CONNECTION WITH HYDROELECTRIC PROJECTS.

When they turn to the Clean Water Act itself, petitioners start by arguing that the State went too far when it specified a minimum stream flow, because any harm caused by the Elkhorn project's diversion of water will not be a

³ *See* 16 U.S.C. § 797(e) ("In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.").

result of a "discharge" as that term is used in section 401. This contention is simply incorrect. When section 401 is read in the context of the entire Act, it becomes clear that the provision did authorize the State to take action when it determined that the construction of a dam in a river would, absent modifications, lead directly to significant degradation of the river as a habitat for fish in violation of federally mandated Water Quality Standards.

A. The Meaning of "Discharge."

As petitioners note, section 401 is triggered when a project "may result in any discharge," and the State is then required to certify that "any such discharge will comply" with sections 301, 302, 303, 306 and 307 of the Act. 33 U.S.C. § 1341(a). Section 401(d) then authorizes the State to impose conditions in its certification designed to assure compliance with these sections "and with any other appropriate requirement of State law." *Id.* § 1341(d).⁴ Petitioners acknowledge only two possible "discharges" associated with their project: temporary releases of pollutants during the construction process and the "discharge" of water at the end of the "tailrace" after the water has been used to generate electricity. *See Br.* at 27-28. They then argue that any degradation of the river as a fishery might be caused by the overall project but has nothing to do with these discharges. It follows, in their view, that the State lacked the authority under

⁴ Although section 401(d) omits any reference to section 303 of the CWA—the provision mandating State Water Quality Standards—petitioners acknowledge that conditions in certifications may still be based on Water Quality Standards, because section 303 is incorporated by reference through § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). *See Pet. Br.* at 9. We note that when Congress amended section 401(a) in 1977 to add a reference there to section 303, the Conference Report stated that this was done solely for the sake of clarity, and that "[s]ection 303 is always included by reference where section 301 is listed" elsewhere in the Act. H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977).

section 401 to condition its certification on measures designed to prevent such a degradation.

This approach is entirely misguided. It depends, first of all, on the proposition that Congress intended to limit states' power by using the term "discharge" in a narrow and technical sense. In fact, precisely the opposite is true. The text of the statute, its history and purpose, and the consistent administrative interpretation all indicate that the term "discharge" in section 401 was intended to have a broad scope—encompassing most if not all of the ways in which a federally licensed project might interfere with water quality, including through diversion of water by a dam.

Section 401 was enacted as part of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 877 (1972). Its predecessor was section 21(b) of the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970), which also required state certifications for every federally licensed "activity . . . which may result in any discharge into the navigable waters." In such circumstances, states were asked to certify "that there is reasonable assurance . . . that such activity will be conducted in a manner which will not violate applicable water quality standards." *Ibid.* Thus, when Congress passed section 401, it carried forward the requirements of a "discharge" as a trigger for the certification requirement, but changed the wording by relating the state certification to this "discharge," rather than to the underlying "activity."

There is no reason to believe, however, that in making this change, Congress saw any real difference between certifications addressing the water-quality impact of an activity as opposed to a discharge. The legislative history describes section 401 as being substantially the same as section 21(b), and the circumstances suggest that the only reason for the change in phraseology was the new

emphasis in 1972 on limiting effluent "discharges."⁵ The certification requirement was extended to cover not only compliance with water quality standards but also compliance with a series of new provisions governing effluent discharges. It thus made sense to refer to the effect of "discharges." But there is no indication that Congress also intended to cut back on states' previously granted power to consider all of the ways in which a project might impact on water quality. Indeed, in 1977, when Congress again amended section 401, the conference report paraphrased the section as still providing that a "federally licensed or permitted activity . . . must be certified to comply with State water quality standards." H.R. Conf. Rep. No. 830, at 96 (emphasis added).

As for the EPA, it has never suggested that state reviews under section 401 are limited to consideration of the effects of some narrowly defined category of "discharges." See *The Federal Energy Regulatory Commission's Hydropower Licensing Program: Hearing Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Government Operations*, 102d Cong., 2d Sess. 91 (1992) (Statement of Martha G. Prothro, Deputy Assistant Administrator, Office of Water, EPA) (hereinafter "Statement of Martha G. Prothro") ("States are authorized to issue, condition, deny, or waive certification of certain Federal permits or licenses that may affect the physical, chemical, or biological integrity of our waters."); EPA, *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes* 20 (Apr. 1989) ("The purpose

⁵ See S. Rep. No. 414, at 69 (Section 401 "is substantially section 21(b) of existing law . . . amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants."); H.R. Rep. No. 911, 92d Cong., 2d Sess. 121 (1972) ("Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms and is consistent with the new requirements of the Federal Water Pollution Control Act.").

of the water quality certification requirement, the Congress said, was to ensure that no license or permit would be issued 'for an activity that through inadequate planning or otherwise could in fact become a source of pollution.'") (quoting 1969 legislative history).⁶ To the contrary, EPA has taken the position that, once at least one potential "discharge" caused by a project has been identified, state certifications can and should address all ways in which the project may impact on water quality. See *id.* at 23 ("[A]ll of the potential effects of a proposed activity on water quality—direct and indirect, short and long term, upstream and downstream, construction and operation—should be part of a State's certification review.").

But the clearest indication of Congress's intent is the fact that, if the goal was to limit state reviews to some narrow subset of the ways in which projects degrade water quality, Congress chose a particularly inapt way to express that intent. Section 502(16) of the CWA provides that the "term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (emphasis added). The use of the word "includes" in this subsection contrasts with nearly all of the other definitions in the Act, which set out what a particular term "means." This phrasing, by itself, suggests that the term should be read inclusively rather than narrowly. That conclusion is reinforced by reference to the separate definition of the narrower term "discharge of a pollutant," which "means . . . any addi-

⁶ Indeed, EPA has not, since 1972, seen any need to amend its section 401 regulations to bring them into conformity with the new statutory phrasing. See 40 C.F.R. § 121.2(a)(3) (requiring state certification that a federally licensed "activity will be conducted in a manner which will not violate applicable water quality standards") (emphasis added).

⁷ This interpretation of the CWA by EPA, like all of the others cited here, is entitled to substantial deference from this Court. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984).

tion of any pollutant to navigable waters from any point source." *Id.* § 1362(12) (emphasis added). A "pollutant," in turn, is defined as any one of a lengthy list of specific kinds of waste products (along with "heat") that are "discharged into water."⁸ Taken together, all of these definitions indicate that the term "discharge," when used "without qualification," was intended to have a broad scope, including *but not limited to* pollution caused when "pollutants" flow into a river from particular "point sources" like pipes or ditches. *See National Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990) (applying section 401 and treating upstream soil erosion caused by a reservoir as a "discharge" originating at the dam); *Power Auth. v. Williams*, 475 N.Y.S.2d 901, 904 (1984) ("discharge" is defined broadly in section 401 and should be construed to allow states to "eliminate conditions of pollution . . . arising from causes other than specific discharges of identifiable pollutants").⁹

The question then becomes what other phenomena, beyond discharges of pollutants from point sources, constitute "discharges" for purposes of section 401. The answer is some or all of the "nonpoint sources of pollution" identified in the Act. Consistent with the broad statutory objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), Congress recognized in the CWA

⁸ The definition lists "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A "point source" is defined as a "discernible, confined and discrete conveyance" such as a pipe, ditch or channel. *Id.* § 1362(14).

⁹ The two cases on which petitioners rely, *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), and *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), see Pet. Br. at 29-30—are totally inapposite since they deal with the scope of the narrower term "discharge of a pollutant" as it is used elsewhere in the Act.

that water pollution takes many forms. Thus, it defined "pollution" as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* § 1362(19). And it focused attention not only on point source discharges but also on "nonpoint sources of pollution." Specific examples include dispersed releases of pollutants such as "runoff" from agricultural, mining and construction activities, 33 U.S.C. § 1314(f)(2)(A)-(C), and "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways or flow diversion facilities," *id.* § 1314(f)(2)(F).¹⁰

EPA has made clear that section 401 can and should be used to control nonpoint sources of pollution. *National Guidance: Wetlands and Nonpoint Source Control Programs* 14 (June 1990). Moreover, petitioners themselves concede that some nonpoint sources of pollution in both of the categories mentioned above constitute "discharges" as that term is used in section 401. Thus, they endorse the provisions in the State's certification aimed at controlling inadvertent releases of pollutants during construction. Pet. Br. at 27-28 & n.19. And they acknowledge that states could properly address some of the physical changes caused when dams impede the flow of water, such as "low dissolved oxygen, dissolved minerals and nutrients, cooled water, sediment, or dissolved gases such as nitrogen." Br. 27 n.18.¹¹ In sum, even petitioners

¹⁰ See also EPA, *Nonpoint Source Guidance* app. B (Dec. 1987) (listing "Major Nonpoint Source (NPS) Pollution Categories and Subcategories," including both general "Construction" and "Hydrologic/habitat Modification" through "Dam construction"). EPA has estimated that "[n]onpoint source pollution accounts for well over half of all impairments to water quality standards in rivers and lakes and an estimated 45 percent of impairments in estuaries." *National Guidance: Wetlands and Nonpoint Source Control Programs* 1 (June 1990).

¹¹ See *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (discussing such effects of dams as nonpoint sources); *National*

recognize implicitly that the term “discharge” in section 401 is broadly defined to cover at least a large portion of the diverse phenomena that constitute “pollution” under the CWA.

B. “Discharge” in the Present Context.

With these general principles in mind, it becomes immediately apparent that petitioners err when they describe only two “discharges” associated with their project. There are others as well, and there is every reason to conclude that Congress intended to allow states to consider all of them.

1. *The Dam Itself as a Discharge.* To begin with, common sense would suggest that the placement of a dam in the Dosewallips River—accomplished by pouring large amounts of concrete and other construction materials into the riverbed—constitutes a “discharge” into the waterway. In this instance, moreover, common sense is confirmed by reference to another place in the statute where Congress used the same word.

Section 404(a) of the CWA authorizes the Army Corps of Engineers to issue permits for the “discharge of dredged or fill material into the navigable waters.” 33 U.S.C. § 1344(a). On its face, this section indicates that a “land fill” project—*i.e.*, the displacement of a body of water by a permanent deposit of earth or other material—constitutes a “discharge.” As a logical matter, it makes sense to view a dam as falling within this category. And, indeed, the applicable regulations promulgated both by the Corps and by EPA confirm that the term “discharge of fill material” includes the “building of any structure

Wildlife Fed’n v. Gorsuch, 693 F.2d 156 (same); *Missouri v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982) (same). These concessions are hardly surprising since, without them, petitioners could not explain why it is universally recognized that a section 401 certification is required for the construction and operation of all federally licensed hydroelectric projects. See Pet. Br. at 27.

or impoundment requiring rock, sand, dirt, or other material for its construction; . . . [and] *dams and dikes*.” 33 C.F.R. § 323.2(f) (emphasis added); see 40 C.F.R. § 232.2(f) (using identical language). It is for this reason that a permit from the Corps is required for every dam that is proposed for the navigable waters, including hydroelectric projects. See *Monongahela Power Co. v. Marsh*, 809 F.2d at 46 (“Indisputably, construction of Monongahela’s proposed hydroelectric facility will entail discharges of dredged and fill material into navigable water.”).

But if a new dam would be a “discharge of fill material” for purposes of section 404, it surely must be a “discharge” for purposes of section 401 as well. The latter term, after all, is broader than the former, and appears in the same statute. See *Commissioner v. Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2011-12 (1993) (broader statutory term “any direct or indirect . . . sale or exchange” must at least include the narrower category of a “sale or exchange”). And, in fact, it is well established that the two sections work in tandem, in the sense that a section 401 certification is required for every “discharge” also covered by section 404. See *Keating v. FERC*, 927 F.2d 616, 619 (D.C. Cir. 1991) (state certification is required for any project requiring a permit under section 404); EPA, *Wetlands and 401 Certification*, *supra*, at 20 (same); 33 C.F.R. § 336.1(a)(1) (“CWA requires the Corps to seek state water quality certification for discharges of . . . fill material into waters of the U.S.”).

At times, petitioners seem to suggest that there was something unusual about the State’s consideration of the hydrologic effects of the Elkhorn dam under a statute linked to “discharges.” But that is precisely what the Army Corps of Engineers does when it is deciding whether to grant a section 404 permit for a “discharge

of dredged or fill material." See 40 C.F.R. §§ 230.30-.32 (guidelines for assessing whether a diversion of water will impair existing habitats for wildlife); *Monongahela Power Co. v. Marsh*, 809 F.2d at 43 (an example of a case where the Corps denied a permit for a project because the dam would have inundated important habitats); *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512-13 (10th Cir. 1985) (rejecting the argument that the Corps could not consider the effects of a reduction in flow on wildlife because it was not directly tied to a "discharge"). The EPA, in turn, has suggested that states themselves should use the same section 404 guidelines applicable to the Corps in determining whether a particular project will result in degradation of the state's waters. See EPA, *Wetlands and 401 Certification*, *supra*, at 14, 16-17; EPA, *Water Quality Standards for Wetlands: National Guidance* 20 (July 1990). See also Statement of Martha G. Prothro, *supra*, at 94 ("EPA . . . has taken steps to support States as they consider the full range of water quality impacts when evaluating Federal permits under Section 401 and licenses, including hydropower licenses. *The types of potential adverse impacts associated with hydropower projects include loss or degradation of aquatic habitat; impacts on wildlife, fisheries, and endangered species that are dependent upon the aquatic environment; . . . and significant changes in water flow volumes and timing.*") (emphasis added).

The real oddity would be a reading of the statute that prevented states from considering one of the direct effects on water quality caused by the placement of a dam in the middle of a river.¹² Under this reading, if a proposed dam or other structure had the effect of entirely eliminating the flow of a river (or obliterating a wetland), a

¹² The very provision requiring State Water Quality Standards provides that they "shall be established taking into consideration [the] use and value" of a state's waters for, among other things, "propagation of fish and wildlife." CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2). Yet petitioners now suggest that states are powerless to protect fish from this kind of destruction.

state would have no role to play in the process because the project would not entail a "discharge" of water or pollutants. Concomitantly, if a project did allow a continued trickle of water, there would be a "discharge" under petitioners' theory, but the State could only take steps to prevent changes in the "condition" of the water in this trickle—not to augment its volume. It is hard to imagine a less sensible interpretation of a statute that is designed to allow states to protect all of the existing beneficial uses of their waters, and to attain any additional uses designated in their Water Quality Standards. See § III *infra*.

2. *The Discharge from the Dam.* In any event, even accepting petitioners' more restrictive understanding of the term "discharge," they ignore one feature of their proposed project. The water that is *not* diverted for use in generating electricity will be "discharged" from the dam through a sluice gate or spillway of some kind. See Pet. Br. 28 n.20.¹³ This discharge, in turn, is directly linked to the degradation of the river as a fishery, because that harm results from the low volume of the discharge. For this reason as well, it is clear that the State was correct in determining that the Elkhorn project would, absent imposition of minimum stream flows, include "discharges" that did not "comply with" the State's Water Quality Standards, as these terms are used in section 401.

III. THE STATE HAD AMPLE LEGAL BASIS FOR ITS DECISION TO PROTECT THE USE OF THE RIVER AS A HABITAT FOR FISH.

In their second argument, petitioners move from a very restrictive definition of the "discharges" that trigger the certification requirement to an equally restrictive analysis of the standards that states may apply in considering the effects of such discharges. Conceding that a state may

¹³ It is hard to see how this feature is any less a "discharge" than the emission of the remaining water from the tailrace.

deny or condition a certification where necessary to enforce its Water Quality Standards promulgated pursuant to section 303 of the CWA, 33 U.S.C. § 1313, they argue that such enforcement must be directly linked to one component of the standards—the “criteria” section. But this argument reflects a fundamental misunderstanding of how State Water Quality Standards work. It also ignores Congress’s deliberate decision to allow states to impose conditions designed to enforce “other appropriate requirement[s] of State law.” CWA § 401(d), 33 U.S.C. § 1341(d).

A. Degradation of the Use of the Dosewallips River as a Habitat for Fish Would Violate the State’s Water Quality Standards.

Under section 303, all states are required to promulgate Water Quality Standards. As petitioners acknowledge, Pet. Br. 31, a state asked to issue a certification under section 401 is authorized, indeed required, to take into account any conflict between the proposed project and its Water Quality Standards. See 40 C.F.R. § 121.2 (a)(3) (state must certify that the activity “will be conducted in a manner which will not violate applicable water quality standards”); EPA, *Wetlands and 401 Certification*, *supra*, at 8 (“[T]he States’ water quality standards are a critical concern of the 401 certification process.”).¹⁴ The only issue here is what *parts* of the standards are independently enforceable and thus provide a basis for a denial of, or condition on, certification.

Water Quality Standards, which must be approved by the EPA, have three components: a “designation of uses” for each body of water, 40 C.F.R. § 131.10, a set of “water quality criteria” protecting the designated uses,

¹⁴ Indeed, these standards were the only guidepost that states used when the certification process was first created in 1970. See Pub. L. No. 91-224, § 21(b)(1), 84 Stat. 91 (1970) (requiring certification that federally licensed “activity will be conducted in a manner which will not violate applicable water quality standards”).

id. § 131.11, and an “antidegradation policy” requiring maintenance of all existing uses, *id.* § 131.12.¹⁵ Uses are designated “tak[ing] into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation.” *Id.* § 131.10(a).

The criteria, in turn, may be “numerical” or “narrative” in form. *Id.* § 131.11(b)(1). They may describe the chemical composition of the water, its physical properties (such as temperature or turbidity), or the *biology* of the aquatic ecosystem. The EPA has in recent years strongly encouraged states to establish biological criteria, because of a growing awareness that “[b]iological impairments from diffuse sources and habitat degradation can be greater than those caused by point source discharges.” EPA, *Biological Criteria: National Program Guidance for Surface Waters* 4 (Apr. 1990). It has also urged the inclusion of criteria specifically addressing the harms associated with “hydrologic” changes in a waterway—*i.e.*, changes in the movement or flow of water. See EPA, *Water Quality Standards for Wetlands*, *supra*, at 16; EPA, *Wetlands and 401 Certification*, *supra*, at 27.

The third component, an antidegradation policy, is mandated because of a recognition that the specific criteria may not anticipate all of the ways in which pollution may degrade a body of water by interfering with a particular existing use. Thus, for example, if release of some new chemical were threatening to render a lake unfit for swimming, that release could be barred under an anti-

¹⁵ Although only the former two components are specifically required by the Act, the antidegradation policy requirement has been in place since 1968 and has been a part of EPA’s water quality standard regulations since they were first promulgated in 1975. See EPA, *Questions and Answers On: Antidegradation* (Aug. 1985) (question 1). In the 1987 amendments to section 303, Congress made specific reference to “the antidegradation policy established under this section.” 33 U.S.C. § 1313(d)(4)(B).

degradation policy even if the state's water quality criteria did not address the acceptable level of that chemical in water.

In this instance, when petitioners applied for section 401 certification, the State of Washington had all three components of Water Quality Standards in place, and those standards had been fully approved by the EPA. The Dosewallips River was classified as "Class AA (Extraordinary)," which meant that it had a variety of designated uses, including migration, rearing and spawning of salmonid fish. Wash. Admin. Code §§ 173-201-045 (1)(b), -050, -080(31) (repealed 1992). Criteria were specified for levels in the water of fecal coliform organisms, dissolved gases, temperature, pH, turbidity and toxic materials. *Id.* § 173-201-045(1)(c) (repealed 1992). And an antidegradation policy provided, in relevant part, that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." *Id.* § 173-201-035(8)(a) (repealed 1992).

Petitioners' argument is that the State was powerless to use the section 401 process to prevent an excessive diversion of water because none of its water quality criteria addressed this issue. There is no doubt, however, that the State could have promulgated a relevant criterion—*e.g.*, a specification of the number of salmon found in a given portion of the river at a given time of year or simply a specification of a minimum stream flow needed to maintain the designated use of the river as a habitat for fish. Thus, there is nothing in principle odd about a state conditioning a certification on maintenance of a minimum stream flow for the purpose of vindicating its Water Quality Standards.

Ultimately, what petitioners are saying is that the State of Washington had to ignore a threatened degradation of a designated and existing use of the river because it had not had the prescience to promulgate a specific criterion

addressing this kind of degradation. In order to arrive at this result, they are required to contend that the State's antidegradation policy is not an independently enforceable limitation on polluting activities but, instead, simply a guideline for the development of the controlling criteria. *See* Pet. Br. at 37-38. But this argument is untenable. There is simply no doubt that states can (indeed must) enforce their Water Quality Standards by protecting uses of waterways from degradation *regardless* of whether that degradation would also conflict with a specified water quality criterion.

As noted above, the State of Washington's antidegradation policy itself directly forbids any degradation of an existing use of a waterway. That prohibition, by virtue of the EPA's approval of the standards, became a requirement of federal law. *Arkansas v. Oklahoma*, 112 S. Ct. at 1059. It is also consistent both with the EPA regulations, which require that the policy protect "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses," 40 C.F.R. § 131.12 (a)(1), and with every available EPA description of how the antidegradation component of Water Quality Standards operates, *see, e.g.*, EPA, *Questions and Answers On: Antidegradation*, *supra*, at 3 ("No activity is allowable under the antidegradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards.") (emphasis added); *id.* at 11 (a "violation of water quality standards" may involve "*either* the antidegradation policy or a criterion") (emphasis added).¹⁶

¹⁶ *See also* *Arkansas v. Oklahoma*, 112 S. Ct. at 1059 (accepting an EPA interpretation of a state's antidegradation requirement as a provision that would be violated if, but only if, "the discharge effected an 'actual detectable or measurable' change in water quality") (quoting an EPA administrative ruling); EPA, *Water Quality Standards for Wetlands*, *supra*, at viii ("The antidegradation policies contained in all State standards provide a powerful tool for the protection of wetlands and can be used by States to regulate point

It is not surprising, therefore, that the EPA has recognized on a number of occasions that antidegradation policies provide a proper, independent basis on which a state may deny or condition a section 401 certification. *See, e.g.,* Statement of Martha G. Prothro, *supra*, at 93-94 ("State antidegradation policies are an integral part of water quality standards and are therefore an integral part of State § 401 certifications."); EPA, *Water Quality Standards for Wetlands*, *supra*, at 24 ("Violation of water quality standards is often the basis for denials or conditioning through Section 401 certification. . . . States have based decisions on their general narrative criteria and antidegradation policies.") (emphasis added).

Moreover, the suggestion that an antidegradation policy is merely intended to guide the development of enforceable criteria makes no sense. If that were the goal, the regulations need only have required that criteria developed by the states be designed to protect existing uses. In fact, the regulations *do* state that "water quality criteria [should] protect [each] *designated* use." 40 C.F.R. § 131.11(a) (emphasis added). But the antidegradation requirement is then set out separately, and applies to every "existing" use, regardless of whether it is "designated" elsewhere in the Water Quality Standards. This distinction is but one more indication that an antidegradation policy is an *independent* check on potentially polluting activities. In sum, when the State of Washington was presented with a proposed project that threatened to degrade an existing beneficial use of a river, it was not only authorized but required under its federally mandated antidegradation policy to take action under section 401.

and nonpoint source discharges to wetlands in the same way as other surface waters.").

B. The Incorporation of State Law Requirements in Section 401(d) Provided an Alternative Basis for the State's Action.

As noted above, section 401(d) also authorizes states to impose conditions where necessary to assure compliance with "any other appropriate requirement of State law." 33 U.S.C. § 1341(d). While the scope of this phrase is unclear, and there must be some limits on the state laws that can be enforced through section 401 certifications, there must also be at least one category of state laws that is included within this authorization. Where, as here, a proposed activity would disrupt a use of a waterway designated in the State's Water Quality Standards, the State must at least be allowed to deny or condition a section 401 certification based on a state law that serves to prevent precisely that form of degradation.¹⁷ After all, all that this would mean would be enforcement of a state law that could have been part of the Water Quality Standards themselves.

Thus, here, the State of Washington had a statute providing that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." Wash. Rev. Code § 90.54.020(3)(a) (1992). This same requirement could well have been a part of the Water Quality Standards. *See* EPA, *Wetlands and 401 Certification*, *supra*, at 27 (urging states to "include a narrative criterion in [their] water quality standards that requires maintenance of base flow necessary to protect the wetland's (or other waterbody's) living resources"). *See also* CWA § 510, 33 U.S.C. § 1370 (preserving the states' right to enforce any more stringent "requirement respecting control or abatement of pollution"). If the incorporation of state law in section 401(d) is to have any mean-

¹⁷ Of course, this issue does not matter if, as argued above, the State antidegradation policy is independently enforceable.

ing, it must at least extend to laws that are not in Water Quality Standards but serve the same purpose. For this reason as well, petitioners are simply incorrect in contending that the State somehow went beyond the types of concerns it was supposed to address when it was asked to issue a certification for the Elkhorn project under section 401.

IV. THERE IS NOTHING ANOMALOUS, OR UNDULY DISRUPTIVE, ABOUT REGULATION OF MINIMUM STREAM FLOWS UNDER SECTION 401 OF THE CLEAN WATER ACT.

Throughout the briefs of petitioners and their *amici*, there are suggestions that the action taken here constitutes a startling extension of the Clean Water Act into a new area, creating potential conflicts with existing state water law and/or FERC's national energy policies. But these efforts to find policy arguments to support hypertechnical statutory interpretations fall completely flat. As we have noted, EPA has repeatedly recognized that states play an appropriate role in regulating planned diversions of water caused by hydroelectric projects. Such state regulation, in turn, poses no threat to state regimes for water allocation or to FERC's oversight of facilities for the generation of electrical power.

A. Water Rights.

Petitioners' argument about water rights, as best we can understand it, is that the entire issue of the effects of "diversions" of water is categorically removed from consideration by states under section 401 because of two other provisions in the CWA—sections 101(g) and 510(2), 33 U.S.C. §§ 1251(g) and 1370(2). Section 101(g) preserves the "authority of each State to allocate quantities of water within its jurisdiction" as well as all "rights to quantities of water which have been established by any State." Section 510(2) then adds that "[e]xcept as expressly provided in [the Act], nothing in [the Act]

shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States."

These provisions do not, however, in some way eliminate the entire category of water diversions from consideration by states under the CWA. To begin with, it can hardly be claimed that allowing the State in this case to consider stream flows in the section 401 process encroached on the State's *own* "authority . . . to allocate quantities of water." It makes little sense for petitioners to cite provisions preserving state power in support of their argument that the issue of minimum stream flow should be determined entirely by a federal agency—FERC. Nor is there any actual conflict with a water right previously granted by the State.¹⁸ Thus, on their face, these sections of the CWA simply do not apply here.

In any event, the legislative history indicates that, even if applicable, these provisions would not preclude some regulation of water *quantity* for purposes of preserving water *quality*. Senator Wallop—the sponsor of the amendment adding section 101(g) to the Act in 1977—acknowledged this reality, stating:

Legitimate water quality measures authorized by this act may at times have some effect on the method of water usage. Water quality standards and their upgrading are legitimate and necessary under this act. The requirements of section 402 and 404 permits may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects.

123 Cong. Rec. 39,212 (1977).

¹⁸ Petitioners themselves apparently do not yet have a water rights permit from the State authorizing them to use water in the river to generate electricity. See Pet. Br. 39 & n.38. Moreover, regardless of how much water does or does not get diverted by the Elkhorn project, the rights of downstream property owners will not be affected because the total volume of water in the river below the project will not change.

In a similar vein, the EPA has taken the position that section 101(g) does not prevent protection of water quality but instead requires avoidance of interference with water rights *where possible*. It stated:

The exact limitations imposed by section 101(g) are unclear; however, the legislative history and the courts interpreting it do indicate that it does not nullify water quality measures authorized by CWA . . . even if such measures incidentally affect individual water rights; those authorities also indicate that if there is a way to reconcile water quality needs and water quantity allocations, such accommodation [sic] should be pursued. In other words, where there are alternate ways to meet the water quality requirements of the Act, the one with least disruption to water quantity allocations should be chosen.

EPA, *Questions and Answers On: Antidegradation*, *supra*, at 11. See also *Riverside Irrigation Dist. v. Andrews*, 758 F.2d at 513 ("A fair reading of the statute as a whole makes clear that, where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation.").

In any event, petitioners' argument proves too much. They concede that a state could properly consider some of the effects of a dam—*i.e.*, the discharge of water that, because of the dam, now has "low dissolved oxygen, dissolved minerals and nutrients, cooled water, sediment, or dissolved gases such as nitrogen," Pet. Br. at 27 n.18. See *id.* at 29. This means that a state could force a redesign of a dam to minimize these effects or could deny certification of a dam altogether. But petitioners then argue that the state cannot consider another effect of a proposed dam—destruction of fisheries—simply because the remedy for that form of degradation is to increase the volume of undiverted water. This distinction is untenable. In *either* case, application of section 401 could have the effect of interfering with a party's full exploita-

tion of a water right. But Congress clearly intended to allow such incidental interference, where necessary to protect water quality. In sum, the contention that a ruling upholding the State's actions in this case will encroach too far on the State's own jurisdiction over water allocation is insupportable.

B. Energy Policy.

It is equally untenable to suggest that allowing states to regulate minimum stream flows will disrupt FERC's overall regulation of the national system for generation of electricity. A state may deny or condition a certification for a project only where its action is "reasonably related" to the enforcement of the substantive provisions incorporated in sections 401(a) and 401(d). *Cf. Escondido Mut. Water Co.*, 466 U.S. at 776. That limitation, in turn, is fully enforceable in court. Here, for example, petitioners argued below that the stream flow condition was excessive because it was designed to "enhance" rather than "preserve" the existing use of the river as a fishery. Ultimately, however, they lost on this contention.

Thus, what petitioners are suggesting is that FERC's regulatory activities will be disrupted because it will no longer have the option of approving projects like theirs—projects that would violate a state's federally mandated Water Quality Standards. But Congress plainly did not intend to allow FERC that option. It authorized FERC to balance environmental and other concerns only *after* states certify compliance with Water Quality Standards. See note 3 *supra*; H.R. Conf. Rep. No. 495, 99th Cong., 2d Sess. 22 (1986) ("Projects licensed years earlier must undergo the scrutiny of today's values as provided in this law and other environmental laws applicable to such projects. If nonpower values cannot be adequately protected, FERC should exercise its authority to restrict or, particularly in the case of original licenses, even deny a license on a waterway.") (emphasis added). In so doing, Congress also added a directive to consider energy con-

servation measures as an alternative means of meeting demand for electrical power. 16 U.S.C. §§ 797(e), 803(a)(2)(C). There is no basis for petitioners' implicit request that this Court second-guess these legislative policy judgments.

CONCLUSION

The decision of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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December 14, 1993

DEC 14 1993

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

PUBLIC UTILITIES DISTRICT NO. 1 OF JEFFERSON
COUNTY AND CITY OF TACOMA,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY, DEPARTMENT OF FISHERIES, AND
DEPARTMENT OF WILDLIFE,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of Washington

BRIEF FOR AMICI CURIAE STATES OF VERMONT, NEW
YORK, ARIZONA, ARKANSAS, CALIFORNIA,
CONNECTICUT, DELAWARE, FLORIDA, GEORGIA,
HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS,
KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS,
MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI,
MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE,
NEW JERSEY, NEW MEXICO, NORTH CAROLINA,
NORTH DAKOTA, OHIO, OKLAHOMA, OREGON,
PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA,
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No. 92-1911

In The

Supreme Court of the United States
October Term, 1993

PUBLIC UTILITIES DISTRICT NO. 1 OF JEFFERSON
COUNTY AND CITY OF TACOMA,

v. *Petitioners,*

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY, DEPARTMENT OF FISHERIES, AND
DEPARTMENT OF WILDLIFE,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of Washington

BRIEF FOR *AMICI CURIAE* STATES OF VERMONT, NEW
YORK, ARIZONA, ARKANSAS, CALIFORNIA,
CONNECTICUT, DELAWARE, FLORIDA, GEORGIA,
HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS,
KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS,
MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI,
MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE,
NEW JERSEY, NEW MEXICO, NORTH CAROLINA,
- NORTH DAKOTA, OHIO, OKLAHOMA, OREGON,
PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA,
TENNESSEE, TEXAS, UTAH, VIRGINIA, WEST
VIRGINIA, WISCONSIN, WYOMING
IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The States submit this brief in support of the State of Washington, Department of Ecology, Department of Fisheries, and Department of Wildlife. This case involves the water quality certification for the proposed Elkhorn

hydroelectric dam, issued to petitioners by the State of Washington under the authority of Clean Water Act ("CWA") § 401, 33 U.S.C. § 1341, on condition that a minimum streamflow be maintained below the dam. Petitioners challenge the State's authority under § 401 to impose the minimum streamflow condition. Petitioners' position, if adopted, would impair the States' ability to ensure compliance with federally mandated and approved water quality standards, through certification proceedings, one of the principal means of implementing the Act's objective to maintain and restore the chemical, biological, and physical integrity of the nation's waters. CWA § 101(a), 33 U.S.C. § 1251(a). In enacting the certification provision in 1970 and amending it in 1972, Congress granted the States authority to enforce the new pollution control provisions and correspondingly limited the power of the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act ("FPA"), which had originally been enacted in 1920. Congress "was aware that the 1972 enactment would have far-reaching consequences and recognized that some other legislative objectives would have to be reconciled with the new pollution control efforts." *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 46 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 816 (1988).¹

The States do not maintain that all hydroelectric projects should not be approved. Indeed, the State involved

¹ The courts have also recognized this, saying, "It can hardly be said that the prescription of additional requirements for hydroelectric projects was an utterly unforeseen or inappropriate consequence." *Monongahela Power Co.*, 809 F.2d at 46.

here, Washington, did not deny a § 401 certification to the project at issue. Neither do the States maintain that all existing hydroelectric dams, such as those involved in the hundreds of relicensing applications FERC will process in the next decade, should be dismantled.² The States submit, however, that hydroelectric projects must comply with the Clean Water Act so that compliance with State water quality standards is ensured. Consequently, this Court should affirm the judgment of the Washington Supreme Court.

² Even though this case arises from an application to construct a new hydroelectric facility, many States are also concerned about the relicensing applications which are clearly subject to the Clean Water Act's requirements. As Congress provided:

In exercising its responsibilities in relicensing, the conferees expect FERC to take into account existing structures and facilities in providing for these non-power and nondevelopmental values. No one expects FERC to require an applicant to tear down an existing project. But neither does anyone expect 'business as usual'. Projects licensed years earlier must undergo the scrutiny of today's values as provided in this law and other environmental laws applicable to such projects. FERC should exercise its authority to restrict or, particularly in the case of original licenses, even deny a license on a waterway. The goal of amended § 4 is to assure a true multiple use of water resources.

H.R. Conf. Rep. No. 99-934, 99th Cong., 2d Sess., 4 U.S. Code & Cong. Admin. News ("USCCAN") 2537, 2538 (1986).

The Clean Water Act regulates dams³ because they may cause significant water quality problems.⁴ For example, dams may alter a river's natural aeration potential, causing dissolved oxygen deficits.⁵ Their operation may also cause river flow to fluctuate. Drops in flow may concentrate wastes discharged into a river downstream of a dam to unacceptable levels.⁶

Dams may also alter and in some cases destroy ecosystems. Dams may slow, capture, hold and divert a river's free flow, flood the upstream river channel, and have varying impacts on temperature and down-stream flow. Existing habitat is destroyed or significantly altered, thus affecting the health and composition of the aquatic biota. Dams are usually located to take advantage of natural drops in elevation. The fast-flowing water resulting from a drop in elevation is a necessary component of

³ Petitioners propose to construct a "10 foot diversion weir" across the full width of the Dosewallips River. Pet. Br., p. 10. A "weir" is defined as "[a] dam across a stream to raise the water, or to convey it to a mill." New Webster's Dictionary 1762 (Coll. ed. 1975).

⁴ See, e.g., *Hydropower in Vermont, An Assessment of Environmental Problems and Opportunities*, Alison M. DesMeules and Cynthia Parks, Vermont Agency of Natural Resources (May 1988). See, also, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 161-64 (D.C. Cir. 1982) (dams effect chemical changes to rivers such as lowering dissolved oxygen levels, altering mineral and nutrient levels, trapping sediment, changing temperature, and supersaturation).

⁵ See, *Simpson Paper (Vermont) Co., Inc. v. Vermont Department of Environmental Conservation and Sierra Club*, No. 92-1012.

⁶ Such problems are experienced on the Blackstone River in Rhode Island.

a healthy river. Such water is highly oxygenated and washes away silts, thus providing a gravel substrate necessary for spawning areas and insect production. The diversion of water eliminates natural flows in reaches that the diversion bypasses ("bypass reach"). Bypass reaches often run for several miles,⁷ thus affecting significant lengths of rivers.

The Statutory Framework

A. The Clean Water Act

"The objective of the [Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). The word "integrity . . . refers to a condition in which the natural structure and function of the ecosystem is maintained." H.R. Rep. No. 92-911; 92nd Cong., 2d Sess., 76-77, reprinted in 1 Legislative History of the Federal Water Pollution Control Act Amendments of 1972 753-64 (1972).

The substantive requirements of the Clean Water Act are established through water quality standards ("WQS") setting forth ambient water quality requirements. The standards must be adopted by the States in conformity with Clean Water Act § 303 and EPA rules. CWA § 303, 33 U.S.C. § 1313; 40 CFR 131.10 (1983). EPA must promulgate standards applicable in States that fail to promulgate such standards. CWA § 303(b), 33 U.S.C. § 1313(b). The standards are considered to be federal law. *Arkansas v. Oklahoma*, 503 U.S. ___, 112 S.Ct. 1046, 1059 (1992).

⁷ The bypass reach in this matter would be 1.2 miles.

The water quality standards are implemented through three programs established by the Act. First, the Act regulates the "discharge of pollutants" through the National Pollutant Discharge Elimination System.⁸ CWA § 402, 33 U.S.C. § 1342. Second, the Act regulates the modification or destruction of aquatic habitat by prohibiting the discharge of dredged or fill material unless permitted. CWA § 404, 33 U.S.C. § 1344. Third, the Act requires EPA and the States to implement programs assuring that other impacts to water quality, *i.e.*, those from nonpoint sources of pollution, comply with water quality standards. CWA §§ 208(b), 304(f), 319, 33 U.S.C. §§ 1288(b), 1314, 1329; *National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir. 1988).

The water quality standards are applied to federally licensed projects through § 401 of the Clean Water Act, 33 U.S.C. § 1341. Section 401 requires an applicant for a federal license authorizing any activity that may cause any discharge to obtain State certification that the discharge will comply with specified water quality requirements established under the Act. 33 U.S.C. § 1341(a)(1). A certification may also include limitations necessary to comply with water quality standards "and with other appropriate requirements of State law." 33 U.S.C. § 1341(d). Such limitations become conditions on the federally issued license. *Ibid.*; *Roosevelt Campobello Park*

⁸ The term 'pollutant' means "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar direct and industrial, municipal, and agricultural waste discharged into water." CWA § 502(6), 33 U.S.C. § 1362(6).

Comm. v. EPA, 684 F.2d 1041, 1056-1057 (1st Cir. 1982). Denial of certification by a State precludes issuance of the federal license as a matter of law.⁹ CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1).

B. The Federal Power Act

Section 4(e) of the FPA empowers FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction". 16 U.S.C. § 797(e). Section 10(a) of the Act also authorizes FERC to issue licenses subject to conditions FERC deems best suited for power development and other public uses of the waters. 16 U.S.C. § 803(a). These sections also expressly direct that FERC consider a project's effect on fish and wildlife as well as "power and development purposes". 16 U.S.C. §§ 797(e), 803(a).

SUMMARY OF ARGUMENT

The decision of the Washington Supreme Court upholding the State's imposition of a minimum stream-flow condition in the water quality certification issued for the Elkhorn hydroelectric project should be affirmed for

⁹ Congress gave the States direct and primary responsibility for the § 401 water quality certification program. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). However, EPA is required to issue certifications where a State does not have the authority to do so. *Ibid.*

several reasons. First, the Federal Power Act does not preempt a State's authority under Clean Water Act § 401 to impose a minimum streamflow condition to assure compliance with State water quality standards. The Federal Power Act and the Clean Water Act provide complementary, not conflicting, roles for both the federal and state governments. Section 401's limitation on FERC is only one of a number of limitations enacted in the interim since passage of the Federal Power Act of 1920. Section 401 provides a meaningful role to the States and allows them to apply every part of their water quality standards, including designated uses, criteria, and the antidegradation policy, as well as appropriate requirements of State law authorized by § 401, to a project.

Second, it is beyond question that Washington has § 401 jurisdiction over the construction and operation of the hydroelectric project at issue. EPA has interpreted § 401 as applying to projects like the one at issue here, recognizing that the authority granted to the States by § 401 to address the water quality impacts of such projects is not limited to dealing with discharges from point sources. EPA's consistent and rational interpretation is entitled to deference by this Court. In 1970, Congress provided that federally licensed activities that may result in any discharge must comply with water quality standards. Congress characterized the 1972 amendments, which provided that the discharge must comply with water quality standards and other provisions of the Clean Water Act, as merely reflecting the Clean Water Act's additional emphasis on effluent limitations. In 1977, Congress confirmed that the 1972 change was not substantive, describing the provision as one which required

federally licensed activities to comply with the water quality standards.

Third, petitioners' argument that only one part of a water quality standard, the chemical, numeric criteria, is enforceable, ignores the other two very important components of water quality standards (the designated uses and the antidegradation policy), is at odds with the plain meaning of the statute, and is contrary to EPA's consistent and historical interpretation.

Fourth, the court properly held that a State could impose a minimum streamflow condition in a water quality certification to assure compliance with water quality standards. Washington's minimum streamflow requirement enforced its antidegradation policy, an essential element of its EPA-approved water quality standards.

Fifth, Washington's minimum streamflow statute is an "appropriate requirement of State law" within the meaning of Section 401(d) which a State may apply when imposing conditions in a water quality certification. Washington acted within the authority § 401 granted to the States when, in imposing conditions to assure compliance with State water quality standards, it applied its base flow statute which directed retention of base flows necessary to provide for preservation of, *inter alia*, fish and imposed the minimum streamflow condition at issue here.

ARGUMENT

The Minimum Streamflow Condition Washington Imposed In Its Water Quality Certification Should Be Affirmed Because It Is Authorized By Clean Water Act § 401

1. FERC's Jurisdiction Here Is Not Exclusive; Various Federal Statutes, Including Section 401 Of The Clean Water Act And The Federal Power Act, Provide Complementary Roles For Federal And State Agencies

Subsequent to enactment of the Federal Power Act of 1920, Congress accommodated federal and state environmental and natural resource concerns by enacting a variety of provisions limiting FERC's power. The power granted the States under Clean Water Act § 401 is only one of these limitations. For example, Congress requires FERC, like all other federal agencies, to comply with the provisions of various federal environmental and natural resource laws, including the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*,¹⁰ the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 *et seq.*, the Federal Lands Management Policy Act ("FLMPA"), 43 U.S.C. § 1761 *et seq.*, and the Clean Water Act. Congress requires FERC to respect the determinations of various federal

¹⁰ See, *Washington State Dept. of Fisheries v. FERC*, 801 F.2d 1516 (9th Cir. 1986) (FERC must comply with Fish and Wildlife Coordination Act); see also, *Udall v. FPC*, 386 U.S. 428 (1967) (FPC must explore wildlife conservation aspect of hydroproject).

environmental and natural resource agencies, including the Departments of Commerce and Interior for matters within their jurisdiction, such as protection of Indian reservations, fisheries, and public lands. See, *Escondido Mutual Water Co. v. LaJolla Indians*, 466 U.S. 765, 772-779 (1984), holding that FERC was required by FPA § 4(e), 16 U.S.C. § 797(e), to include the Secretary of Interior's conditions in its hydroelectric licenses with respect to projects located within Indian reservations under his supervision.¹¹ See also, the FLMPA, 43 U.S.C. § 1761 *et seq.*, as amended by P.L. 102-486, 106 Stat. 3096-3097, Tit. XXIV, § 2401, overturning holding in *California and Henwood Associates Inc. v. FERC*, 966 F.2d 1541, 1561 (9th Cir. 1992), that the Bureau of Land Management had no authority to require right-of-way permit for hydroelectric projects involving public lands; see also, 16 U.S.C. § 811, as clarified by P.L. 102-486, 106 Stat. 3008, Title XVII, § 1701(b), vacating FERC's rule narrowly interpreting "fishway" and providing that any future definition promulgated by FERC "shall have no force and effect unless

¹¹ The conditions challenged in the *Escondido* case, like that in this case, also dealt with water quantity issues. *Escondido* involved requirements that certain Indian Tribes be allowed to use a specified quantity of the water which otherwise would have been used by the licensees. 466 U.S. at 772.

In *Escondido*, this Court stated that the standard of review applied to conditions imposed by federal land management agencies in FERC proceedings is whether they are reasonably related to the goal of protecting resources on federal reservations. 466 U.S. at 777-778. This Court should apply an analogous standard when reviewing the condition imposed here under Section 401: whether the condition is reasonably related to the goal of ensuring compliance with water quality standards.

concurred in by the Secretaries of Commerce and Interior." As can be seen, Congress has used a variety of legislative techniques when imposing these limitations, at times specifically mentioning FERC, and at other times merely imposing a uniform compliance requirement on all federal agencies and not including any special exception or exemption for FERC.

Section 401 is not the only limitation on FERC contained in the Clean Water Act.¹² Section 404, which imposes a permit requirement regulating the discharge of dredged or fill material, also imposes a limitation on FERC's authority. The courts have repeatedly held that 404's permit requirement applies to projects licensed by FERC. *Scenic Hudson Preservation Conference v. Calloway*, 499 F.2d 127 (2d Cir. 1974) (§ 404 applies to hydroelectric project licensed by FPC); *Monongahela Power Co.*, 809 F.2d at 47 (§ 404 applies to FERC-licensed hydroproject because no provision in FPA or § 404 exempts such projects from 404's permitting requirements; if Congress did not like result in *Scenic Hudson*, it could have changed 404 when enacting 1977 amendments to Water Act, but did not do so).

When the certification requirement was first enacted, Senator Edmund Muskie called it "the most important section" of the 1970 water pollution legislation and then said:

¹² Petitioners' reliance on CWA § 101(g), 33 U.S.C. § 1251(g), is misplaced. That section clarifies that the Clean Water Act shall not interfere with a State's authority to allocate quantities of water. That section is therefore inapplicable to this case.

No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standards. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards.

Cong. Rec. Senate, p. 8984, March 24, 1970.¹³

As discussed *infra*, there is no doubt that Section 401 applies to FERC's hydroelectric licensing activities. As Congress stated:

This section is substantially section 21(b) of existing law . . . [Section 401] continues the authority of the State or interstate agency to act to deny a permit and thereby prevent a federal license or permit from issuing to a discharge source within such State or jurisdiction of the interstate agency. Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the Atomic Energy Commission, *Federal Power Commission*, or the Corps of Engineers unless the State action was overturned in the appropriate courts of jurisdiction.

S.R. Rep. No. 92-414, 92d Cong., 1st Sess., *reprinted in* 2 USCCAN 3735 (1972) (emphasis added).¹⁴

¹³ Senator Muskie was the chief sponsor of the Water Quality Improvement Act of 1970, which contained the Section 21(b) certification requirement. *See, New Hampshire v. Atomic Energy Commission*, 406 F.2d 170, 176 (1st Cir. 1969), *cert. denied*, 395 U.S. 962 (1969).

¹⁴ As discussed later in this brief in the "discharge" argument, if Congress were making a major change in the

The 1986 Electric Consumer Protection Act amendments¹⁵ ("ECPA") to the Federal Power Act did not alter the federal-state relationship created by the certification requirement; they merely confirmed FERC's responsibility to give "equal consideration" to non-development issues, including environmental ones, and provided specific procedures for fulfilling that responsibility. This pointed clarification did not impliedly repeal Section 401's applicability to FERC.

[T]he bill does not amend or change the Fish and Wildlife Coordination Act, NEPA or other environmental laws. It addresses and clarifies FERC's procedures and decisionmaking to ensure that those laws are fully met.

H.R. Rep. 99-507, 99th Cong. 2d Sess., reprinted in 4 USCCAN 2508 (1986) (emphasis added).¹⁶

certification jurisdictional trigger and narrowing that jurisdiction from regulating the water pollution impacts of a project's activity to merely relating a point source discharge, surely Congress would not have characterized the 1972 certification provision as a non-substantive change and a continuation of the States' authority under the 1970 Act.

¹⁵ P.L. 99-495, 100 Stat. 1243, 16 U.S.C. §§ 797(e), 803(a).

¹⁶ The Report also explicitly stated that the amendments did not alter the judicial decisions issued in various cases requiring FERC to comply with different laws, including *Escondido Mutual Water Co.*, 466 U.S. 765, *supra*, (FERC bound to accept terms and conditions from Federal land managers to protect resources on Federal lands), *Confederated Tribes of the Yakima Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), (FERC relicensing decision reversed because it failed to adequately consider fisheries matters and failed to prepare environmental impact statement), *Tulalip Tribes of Washington v. FERC*, 732 F.2d 1451 (9th Cir. 1984), (FERC

Thus, the ECPA amendments, which reinforce FERC's responsibilities regarding fish and wildlife, did not repeal or limit Clean Water Act § 303's directive that States adopt water quality standards which take "into consideration their use and value for . . . propagation of fish and wildlife". Congress instead enacted two statutes specifically requiring protection of fish and wildlife. A State fulfills its responsibility through its water quality standards and the enforcement of those standards in a water quality certification; FERC discharges its responsibility during the balancing process it undertakes during its licensing proceeding.

Further, if Congress felt that ECPA conflicted with Section 401, it had every opportunity to amend Section 401 to that effect when it enacted the Water Quality Act of 1987. It did not. To the contrary, Congress bolstered the Clean Water Act's mandate that nonpoint sources of pollution such as diversion dams are required to comply with water quality standards. CWA § 319, 33 U.S.C. § 1329.

wrongly allowed new diversion projects to be included in its exemption program), *The Steamboatmen v. FERC*, 759 F.2d 1382 (9th Cir. 1985), (FERC required to comply with NEPA) and similar cases which provided "guidance and redirection to the Commission". H.R. Rep. 99-507, 99th Cong., 2d Sess., reprinted in 4 USCCAN 2508 (1986). "The Committee intends that the Commission should adhere to the mandate of these cases." H.R. Rep. 99-507, reprinted in 4 USCCAN 2508. The House Conference report also stated that "There is no intention in any way to change the holdings in relevant cases, such as *Udall v. FPC*, which the conferees intend will continue to apply to FERC's hydroelectric program." H.R. Conf. Rep. 99-934, 99th Cong., 2d Sess., reprinted in 4 USCCAN 2537, 2538 (1986).

This Court's prior decision interpreting the scope of the Federal Power Act in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946), is of limited relevance here because it was decided prior to enactment of Section 401. Furthermore, unlike *First Iowa*, this is not a preemption case; this case involves construing two federal statutes to give effect to each.

Similarly, *California v. FERC*, 495 U.S. 490 (1990), is also of limited relevance to this case because Section 401 was not involved in that case and because this case, unlike *California v. FERC*, does not involve proprietary rights or a State water rights permit. In that case, California issued a water right permit to a FERC licensee five years after FERC had issued its license. The State's license imposed a minimum flow condition different from the minimum flow condition FERC had previously imposed.¹⁷

This Court, applying the doctrine of *stare decisis*, held that FPA § 27 did not save California's streamflow condition because such instream flows are not proprietary rights under California law, and therefore were not specifically saved by § 27. The Court cautioned, however, that:

[j]ust as courts may not find State measures preempted in the absence of clear evidence that Congress so intended, so must they give full effect to evidence that Congress considered and

¹⁷ This is a dramatically different procedure from that used by a state exercising Section 401 jurisdiction. In the 401 situation, as the Washington court correctly stated, the State must make its certification determination prior to FERC's making its licensing determination. 18 CFR 4.38(f)(7) (1991).

sought to preserve the States' coordinate regulatory role in our federal scheme.

495 U.S. 497. Congress crafted precisely such a coordinate regulatory role for the States in the federal regulatory scheme for hydroelectric projects when it enacted Section 401. Furthermore, Section 401 is the kind of "express congressional command" outside of the Federal Power Act that this Court found to be lacking in the *First Iowa* situation. See, *California v. FERC*, 495 U.S. at 501.

This Court has previously recognized that the "Clean Water Act anticipates a partnership between the States and the Federal government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters' ". *Arkansas v. Oklahoma*, 503 U.S. ___, 112 S.Ct. 1046 (1992). Section 401 is part of that partnership.

2. Washington Acted Within Its § 401 Authority When It Imposed The Streamflow Condition Because § 401 Regulates The Water Quality Impacts Of Hydroelectric Projects

Section 401 applies the Clean Water Act to federally licensed projects which may cause impacts to water quality. The plain language of § 401, its context within the Clean Water Act, and its legislative history demonstrate that § 401 grants the States authority to regulate all water quality impacts of federally licensed projects regardless of whether the impact is caused by a discharge from a point or nonpoint source. In addition, EPA, the federal agency charged with administering and interpreting the Clean Water Act, and whose interpretation is therefore

entitled to deference, has interpreted § 401 as applying to the water quality impacts of hydroelectric projects, whether or not those impacts are caused by point or nonpoint sources. Petitioners' overly technical arguments¹⁸ ignore the far-reaching purpose of the Clean Water Act and fail to recognize that a hydroproject's adverse water quality impacts emanate from both point and nonpoint source discharges. See, "Interest" section, *supra*.

The plain language of the Clean Water Act demonstrates that nonpoint source impacts of federally licensed projects come within the scope of § 401. The Clean Water Act's definition of "discharge", when used without qualification as it is in § 401, merely includes, but is not limited to, point source discharges. *Contrast*, 33 U.S.C. § 1362(12), which defines "discharge of pollutants" to "mean" the items thereafter listed, and § 1362(16), which defines "discharge" to "include" the items thereafter listed.¹⁹ The term "any discharge" in § 401, then, clearly means that the States may deny or condition certification of *any* type of discharge on compliance with water quality standards.

¹⁸ *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 292 (D.C.Cir.1981) held:

Courts have held that the Clean Water Act is to be given a reasonable interpretation which is not parsed and dissected with the meticulous technicality applied in testing other statutes and instruments.

¹⁹ All other definitions in § 502 use the all-inclusive term "means". Congress deliberately used different, less inclusive language in defining "discharge" when used without qualification.

Furthermore, § 401, in contrast with § 402, which regulates point source discharges, specifically requires compliance with the ambient based water quality standards established under Clean Water Act § 303, 33 U.S.C. § 1313. 33 U.S.C. § 1341(a)(1).²⁰ Nonpoint sources of pollution are governed by the water quality standards. *Consumers Power Co.*, 862 F.2d at 588. There would have been no need for Congress to specifically incorporate § 303's ambient standards into § 401 if, as suggested by the petitioners, § 401 was limited to regulating the point source discharge of pollutants.

Indeed, the Clean Water Act mandates that both point and nonpoint sources of pollution be managed to attain and maintain compliance with water quality standards.²¹ CWA §§ 208(b)(2), 304, 319, 33 U.S.C. §§ 1288(b)(2), 1314, 1329. Pollution is defined as "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." CWA § 502(19), 33 U.S.C. § 1362(19). A dam or diversion unquestionably is a man-made alteration of the chemical, physical, and biological integrity of water. Further, § 319 was added to the Clean Water Act through the Water Quality Act of 1987, which stated the following:

it is the national policy that programs for the control of nonpoint sources of pollution be

²⁰ Sections 401(a)(1) and 402 both incorporate §§ 301, 302, 306 and 307 by reference.

²¹ Petitioners' assertion that a discharge "implies the concept of an addition of something to the receiving waters," pet. brief at 23, does not assist them. Congress recognizes that nonpoint sources "add" pollution to navigable waters. CWA § 319(a)(1)(B), 33 U.S.C. § 1329(a)(1)(B).

developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.

CWA § 101(a)(7), 33 U.S.C. § 1251(a)(7). *See, also, Consumers Power Co.*, 862 F.2d at 588 (Congress, in drafting the Water Quality Act of 1987, specifically focused on the water pollution problems caused by dams).

The Clean Water Act recognizes that "changes in the movement, flow, or circulation of any navigable waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities" are nonpoint sources of pollution. CWA § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F). Accordingly, EPA has listed hydrological modifications including channelization, dam construction, flow regulation or modification and streambank modification as one of the "major nonpoint source pollution categories." *Nonpoint Source Guidance*, U.S.E.P.A. (Dec. 1987); *see also*, Pet. App. at 8a. EPA's construction is reasonable and thus must be given controlling weight. *Arkansas v. Oklahoma*, 503 U.S. ___, 112 S.Ct. 1046, 1060 (1992); *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1983).

Moreover, § 401's legislative history indicates that Congress clearly intended § 401 to apply to nonpoint source discharges. The 1970 certification provision initially required the State to certify that the "activity" complied with water quality standards. *Compare*, former 33 U.S.C. § 1171(b), referred to as "Section 21(b)", with existing 33 U.S.C. § 1341, referred to as "Section 401". When the 1972 Clean Water Act amendments added a new emphasis on effluent limitations to control pollution

at its source, Congress characterized its revisions to § 401 – including a requirement that the discharge comply with various provisions of the Clean Water Act – as making no substantive changes in the provision other than to add the references to the new provisions of the Act. S. Rep. No. 92-414, 92d Cong., 1st Sess., reprinted in 2 USCCAN 3735 (1972). *See*, discussion in Section 1 of this brief. If Congress intended to narrow the provision's reach, rather than expand it, surely Congress would not have characterized the changes as a mere continuation of the provision. *See*, discussion, *supra*. Finally, in 1977, when Congress again amended § 401 to specifically incorporate § 303, it again characterized the provision as regulating federally licensed activities which may discharge into navigable waters. H.R. Rep. No. 95-370, 95th Cong. 1st Sess., reprinted in 3 USCCAN 4424, 4471 (1977).

EPA construes § 401 as the appropriate mechanism for States to address all water quality impacts caused by the operation of a hydroelectric facility:

EPA, as the principal agency responsible for administering the CWA, has taken steps to support States as they consider the full range of water quality impacts when evaluating Federal permits under Section 401 and licenses, including hydropower licenses. The types of potential adverse impacts associated with hydropower projects include loss or degradation of aquatic habitat; impacts on wildlife, fisheries, and endangered species that are dependent on the aquatic environment; accumulation of contaminated sediments; nonpoint source impacts; water chemistry problems such as low levels of

dissolved oxygen; significant changes in temperature; and significant changes in water flow volumes and timing.

Statement of Martha G. Prothro, Deputy Assistant Administrator for Water, EPA, before the Subcommittee on Environment, Energy and Natural Resources, of the House of Representatives (May 15, 1992) Appendix at 15a. *See also*, Pet. app. at 8a.

FERC has also consistently offered the view that § 401 may regulate the operation of existing dams. FERC endorsed § 401 conditions requiring spillage of water at the dam to redress dissolved oxygen problems caused by the dams and their operation in *OMYA, Inc.*, 62 FERC ¶ 62,224 (1993) and in *Environmental Assessment for Hydropower License, Gilman Hydroelectric Project*, No. 2392, FERC, Office of Hydropower Licensing (April 4, 1990), pending before this Court *sub nom.*, *Simpson Paper (Vermont) Co., Inc. v. Vermont Department of Environmental Conservation and Sierra Club*, No. 92-1012. *See also* 18 CFR § 4.38(f)(7) (1991) (requiring applicants for relicensure to obtain § 401 certification).

Petitioners' claim that § 401 may govern tailrace discharges but not the pollution added by changes in the movement, flow, or circulation leads to absurd results. The Clean Water Act would not redress the water quality impacts caused by petitioners' project if § 401 precluded its applicability to the project's most severe impacts on water quality. Section 401 should not be construed to produce such an absurd result. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (Interpretations of statute which would produce absurd results are to be

avoided if alternative interpretations consistent with legislative purpose are available); *Environmental Defense Fund v. Costle*, 657 F.2d 275, 292 (D.C. Cir. 1981) (Clean Water Act to be given reasonable construction).

Finally, the petitioners' argument does not realistically reflect the design and operation of hydroelectric dams. Section 401 applies to any federally licensed activity "which may result in any discharge into the navigable waters." 33 U.S.C. § 1341. The petitioners concede that the term "any discharge into the navigable waters" includes the discharge of impounded waters, Pet. brief at 23, but then assert that their diversion dam does not create a discharge. Pet. brief at 23. However, all hydroelectric dams are designed, built and operated so that they may discharge impounded waters over a spillway or through a sluice gate or other similar mechanism.²² Indeed, the record reflects that the petitioners propose to discharge a minimum of 65 cubic feet per second of impounded waters from their dam. Pet. app. at 5a.

3. The Washington Court Properly Upheld The State's Reliance On The Designated Uses Element Of Its EPA-Approved Water Quality Standards

Petitioners erroneously claim (Pet. Br., p. 32) that designated uses, which are one element of State water quality standards, are mere goals that may be achieved only through the operation of criteria. CWA

²² *Design of Small Dams*, U.S. Bureau of Reclamation, 2d ed. (1973); Craeger and Justin, *Hydroelectric Handbook* 100, 346 (2d ed. 1965).

§ 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). Under petitioners' misguided view, the absence of an applicable criterion allows the violation of a designated use. Criteria, however, are merely one means to an end; they are not the end in themselves. The designated uses are paramount.

Petitioners' claim is inapposite to § 401's plain language. Section 401(a)(1) expressly provides that a state may deny certification if a project will not "comply with applicable provisions of sections . . . 303." Petitioners concede these applicable provisions include the water quality standards. Pet. Br., p. 31.

Section 303 also fails to provide support for the petitioners' argument. It states that criteria are to be "based upon" designated uses; it does not say that criteria are the exclusive mechanisms to assure compliance with those uses. Indeed, EPA's regulations specifically require dams to be operated to attain designated uses, 40 CFR § 131.10(g)(4) (1991), and provide that "[w]hen criteria are met, water quality will generally protect the designated use." 40 CFR 131.3(b) (1991). (emphasis added). EPA recognizes there will be instances where the criteria are insufficient to protect the use and thus requires States to fashion limitations based directly on the use.

Most important, petitioners' argument represents a fundamental and dangerous departure from long established methods of implementing the Clean Water Act which allow States to protect designated uses even though they may not have adopted a specific criteria. For example, the Vermont Department of Fish and Wildlife's fish hatchery on Grand Isle in Lake Champlain holds a

§ 402 discharge permit regulating its discharge of antibiotics. *Amended Discharge Permit*, No. 3-1312, Vermont Dept. Env. Cons. (Sept. 24, 1992).²³ Because Vermont does not have any criterion applicable to antibiotics,²⁴ its Department of Environmental Conservation fashioned a case specific permit limitation "based on sound scientific²⁵ rationale and contain[ing] sufficient parameters . . . to protect the designated use" of Lake Champlain as a public drinking water supply. 10 Vt. Stat. Ann. § 1253(b); Vt. WQS § 3-03(A)(1) (1991); 30 CFR 131.11(a)(1) (1983). Petitioners' argument, if adopted, could preclude the protection of Lake Champlain and endanger its uses.

EPA has consistently interpreted § 401 and state obligations under the Clean Water Act to require the full implementation of the water quality standards.

[P]rotection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of the multiple elements which together make up aquatic systems including the aquatic life,

²³ The permit condition is as follows: "Terramycin - Use shall not exceed 3.75 g per 100 lb. of fish per day. The permittee shall report the dates and quantities used."

²⁴ Vermont and Washington have only 10 criteria. EPA established only 7 criteria in the water quality standards it promulgated for the Colville Confederated Tribes Indian Reservation. 33 C.F.R. § 131.35 (1989). These criteria are: enterococci bacteria, dissolved oxygen, dissolved gas, temperature, pH, turbidity, and toxics. They clearly do not cover all impacts to water quality.

²⁵ Washington similarly premised its streamflow condition on a sound scientific rationale. Pet. app. at 4a-5a, 24a-27a.

wildlife, wetlands, and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system. Relevant water quality issues include the toxicity and bioaccumulation of pollutants, the diversity and composition of the aquatic species, entrapment of pollutants in sediment, stormwater and nonpoint source impacts, habitat loss, and hydrological changes.

Letter from LuJuana Wilcher, Assistant Administrator, EPA to Hon. Lois Cashell, Secretary, FERC (Jan. 18, 1991) (Pet. App. at 8a). As discussed earlier, EPA's interpretation is reasonable and is therefore conclusive. *Arkansas*, 503 U.S. ___, 112 S. Ct. at 1060.

4. The Washington Court Properly Upheld The State's Reliance On Its Antidegradation Policy As A Basis For Imposing The Streamflow Condition

Washington's imposition of a minimum streamflow condition based on its EPA-approved antidegradation standard was within the authority Congress gave the States in Section 401. The antidegradation policy is an essential element of a State's EPA-approved water quality standard. 40 CFR 131.12 (1983).

The antidegradation provision, insofar as it is relevant to this case, is used: (a) to protect and maintain existing instream uses²⁶ and the level of water quality

²⁶ "Existing uses" are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water body standards. 40 CFR 131.3(e). "Designated uses", by contrast, are those uses specified in water quality standards for each water body or segment whether or

necessary to protect them, and (b) to maintain and protect high quality waters – those waters where the quality meets or exceeds the level necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the water. 40 CFR 131.12(a)(1),(2).²⁷

Under EPA's interpretation of the statute, the antidegradation standard is just as important an element of water quality standards as are the designated uses and the criteria. Furthermore, the antidegradation standard is just as important to protecting the designated uses as are the water quality criteria. It is the key to protecting existing uses and high quality uses. It is essential to attaining designated uses. In a word, it is indispensable.

EPA interprets the purpose of the antidegradation policy to prevent the State from permitting the degradation of water quality to the detriment of the existing use. 40 CFR 131.12(a). Washington's policy provides: "Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed". WAC 173-201-035(8)(a). In this case, the

not they are being attained. 40 CFR 131.3(f). In a nutshell, existing uses must be maintained and designated uses must be attained unless it is not feasible to do so. 40 CFR 131.10(g),(h).

²⁷ The policy also provides that high quality waters constituting an outstanding national resource, such as waters of national parks and wildlife refuges and "waters of exceptional recreational and ecological significance" are to be maintained and protected. 40 CFR 131.12(a).

existing beneficial, and designated, use is fish migration, rearing, spawning, and harvesting. WAC 173-201-045(1)(b)(iii). The Dosewallips River currently supports populations of salmon, steelhead and resident trout. To protect these populations, Washington applied its EPA-approved antidegradation standard to regulate streamflow in order to protect the existing fishery use.²⁸ It follows that the State had no choice under its federal antidegradation law but to impose the minimum flow requirement.

5. Washington Properly Relied On § 401(d)

The Washington court alternatively held that the base flow statute was an "other appropriate requirement of state law." Petitioners wrongly assert that § 401(d) did not authorize Washington to set a minimum flow condition necessary for compliance with its water quality standards. The base flow requirement is clearly related to the protection of water quality and the water quality standards. Consequently, under the standard of review established by this Court in *Escondido Mutual Water Co.*, 466 U.S. at 777-778, *i.e.*, whether the conditions are reasonably related to the goal of protecting water quality, imposition of the minimum streamflow condition was reasonable and should be affirmed.

²⁸ It is of no moment that a program staff member, when inserting the minimum streamflow condition in the certification, incorrectly characterized the project as complying with water quality standards because the law, as interpreted by the courts, determines the scope of water quality standards.

If § 401(d) is to be given purpose, it must extend to state laws beyond the water quality standards. As evidenced by §§ 401(a) and (b), Congress knew how to specify provisions of the Clean Water Act for implementation through § 401. It did not opt in § 401(a)(1) to authorize the denial or conditioning of certifications based on specified provisions of the Act. Rather, it plainly chose to authorize states to assure compliance with "any other appropriate" state laws through § 401(d).

Finally, the word "appropriate" in § 401(d) limits the state laws that it may effectuate. Washington's statute providing that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values"²⁹ mirrors § 303's mandate that water quality standards protect a water's "uses and values for . . . propagation of fish and wildlife, recreational purposes . . . and [its] use for navigation." CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). It would be hard to find a State law much more related to water quality standards. Washington's reliance on this requirement of state law was thus appropriate.

—————◆—————

²⁹ RCW 90.54.020(3)(a)

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed.

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THE FEDERAL ENERGY REGULATORY COMMISSION'S HYDROPOWER LICENSING PROGRAM

HEARING
BEFORE THE

ENVIRONMENT, ENERGY, AND
NATURAL RESOURCES SUBCOMMITTEE
OF THE

COMMITTEE ON
GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

MAY 15, 1992

Printed for the use of the Committee on
Government Operations

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1993

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* * *

Mr. SYNAR. Thank you, doctor.

Martha Prothro, Welcome back. Ms. Prothro is the Deputy Assistant Administrator, Office of Water, at the U.S. EPA.

STATEMENT OF MARTHA G. PROTHRO, DEPUTY ASSISTANT ADMINISTRATOR, OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY

Ms. PROTHRO. Good morning Mr. Chairman. It is my pleasure to be here to discuss the role of EPA and the CWA in hydropower relicensing.

EPA's 1990 water quality inventory indicates only 63 percent of assessed rivers are today considered fishable and swimmable, the goals of the Clean Water Act.

Hydrologic and habitat modification as cited by States are the third leading cause of impairment of rivers. The goal of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

The CWA provides for water quality standards addressing all three of these characteristics of high quality waters - not only chemical integrity, but also the integrity of biological resources and the physical integrity of the water body. The Act also provides for State water quality certification of certain Federal permits or licenses.

These certifications are based on State water quality standards. If a license does not insure compliance with State standards, certification can be denied or conditioned.

EPA requires States to adopt standards with three basic components. First, the State is to designate the water uses that it wishes to protect for each of its waters, for example drinking water supplies, support of fish and wildlife, or recreational.

Second, the State is to adopt a criteria to protect those uses. Criteria may be numeric or narrative and they may relate to chemical, biological, or physical characteristics of the water.

Finally, the State must adopt an antidegradation policy to protect its high quality waters. Wherever attainable, States must strive to achieve fishable and swimmable water quality.

All States have established narrative criteria describing the water quality conditions to be achieved and most have a wide array of chemical specific numeric criteria for the water column. EPA has recently begun to emphasize that States should also include more specific criteria for habitat protection, criteria to help prevent contamination of sediments and criteria for the protection of wildlife. Some States are way ahead of us on this and we are using them as examples for other States to move forward.

Finally, States are to include antidegradation policies which should protect existing uses and existing water quality, especially for high quality and ecologically unique waters. EPA assists and guides the States in the certification process. We provide grant support, guidance, and sometimes technical input regarding the potential and environmental impacts of individual projects.

EPA supports States as they consider the full range of water quality impacts. Potential impacts associated with hydropower projects include loss or degradation of aquatic habitat; impacts on wildlife, fisheries, and endangered species that are dependent upon the aquatic environment; accumulation of contaminated sediments; nonpoint source runoff that pollutes the water; water

chemistry problems such as low levels of water of dissolved oxygen; significant changes in temperature; and significant changes in water flows.

FERC has questioned the extent of State certification authority, suggesting it may be limited to chemical integrity. The States have indicated their ability to enhance and protect water quality would be undercut if their authority to certify FERC licenses were limited.

Another issue of concern to States is the sometimes sporadic enforcements of section 401 conditions of FERC licenses. In response to State concerns and a letter sent to EPA by a FERC official, we wrote to FERC in January 1991 to clarify that the Clean Water Act does require more than just protecting the chemistry of the water column.

We also have responsibilities under section 404 of the Clean Water Act that relate mostly to licensing of new dams that involve dredge and fill activities. Those responsibilities are discussed more fully in my written testimony. And, of course we also have a role in the NEPA process.

The environmental applications of hydropower licenses are generally evaluated by FERC in their EIS's and environmental assessments under NEPA, and we do review those under the authority of NEPA and the Clean Air Act. Our recommendations, like those of State certifications, may increase projects costs in order to preserve current and future societal benefits produced by the natural resources we are charged to protect.

In the vast majority of cases it is possible to design or modify a project to produce energy and still achieve

environmental goals. By the year 1999, a large number of FERC licenses for existing hydropower projects will expire. We have been working with FERC to plan for this prodigious workload and we are hoping to establish some written agreement with FERC on the way we will interact in this process.

Our goal is to achieve both fish and environmentally responsible licensing for hydropower projects. We believe a written agreement will help us and we have some examples we can use as models, examples of agreements with other agencies.

Although FERC is reluctant to adopt some of the State certification conditions in its licenses, FERC now does consider biological and physical impacts on the Nation's waters. We feel this is a big step in the right direction. We feel that it is important to note that the American public has spent billions of dollars to abate pollution from industries and municipalities so public health would be protected, but also enjoyment of recreation in and on the waters would be possible and that ecological systems could be enhanced and protected. It makes little sense to insure water chemistry supports these goals if habitat destruction and hydro modification can readily defeat them.

I would be happy to answer any questions.

[The prepared statement of Ms. Prothro follows:]

STATEMENT OF
 MARTHA G. PROTHRO
 DEPUTY ASSISTANT ADMINISTRATOR
 OFFICE OF WATER
 U.S. ENVIRONMENTAL PROTECTION AGENCY
 BEFORE THE SUBCOMMITTEE ON ENVIRONMENT,
 ENERGY, AND NATURAL RESOURCES OF THE
 COMMITTEE ON GOVERNMENT OPERATIONS
 HOUSE OF REPRESENTATIVES

MAY 15, 1992

Mr. Chairman and distinguished members of the Committee, it is my pleasure to come before you today to assist in your review of the operations and procedures of the Federal Energy Regulatory Commission's (FERC's) hydropower licensing program. In your letter of invitation, you inquired about several specific issues concerning the Environmental Protection Agency (EPA) and our role in State certification of Federal permits and licenses under Section 401 of the Clean Water Act (CWA). You requested that we discuss the environmental review associated with FERC's hydropower licensing process and FERC's relationship with State agencies responsible for certifying that proposed projects meet CWA requirements. In addition, a third question related to the CWA is the potential impact of legislative proposals on FERC's hydropower activities.

Let me begin today by giving a brief status of the health of our Nation's rivers. Our Nation's rivers have sustained long-term adverse impacts. The 1990 Water Quality Inventory prepared by EPA based on State reports under Section 305(b) of the CWA, indicates that only 63 percent of assessed rivers are considered "swimmable and fishable." The most extensive causes of impairment to our Nation's rivers, cited in the Section

305(b) report, were siltation, nutrients, low dissolved oxygen, and pathogens. Agricultural runoff was the most extensive source of pollution; however, hydrologic and habitat modification was the third leading source of impairment of our Nation's rivers. Sometimes the effect of pollution sources is the alteration of natural flow regimes, which may adversely affect habitat and fishery resources. One example of this effect on a fishery is the Columbia River System, which has the largest dam system for electric power in the world. Anadromous fish runs in the Columbia and Snake River Basins are now estimated to be less than 25% of levels that would have been expected without the dams.¹

A recent study by the American Fisheries Society's Endangered Species Committee found nearly one-third of native North American freshwater fish species are endangered, threatened, or of special concern and 93 percent of these have been adversely affected by habitat loss. This same report, indicated that one-tenth of the species of freshwater mussels has become extinct. Approximately 73% of the remaining species are considered rare or imperiled due primarily to habitat destruction from pollution from a number of sources, including dam construction.

The stated goal of the CWA is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. The CWA authorizes adoption of water

¹ Northwest Power Planning Council, Impacts and Implications of the Pacific Northwest Power Bill (Rep. No. EMD-79-105, 1979).

quality standards addressing all three of the characteristics of high quality waters – not only chemical integrity, but also the integrity of biological resources and the physical integrity of the water body. One valuable tool to protect the health and viability of our Nation's waters is Section 401 of the CWA which provides for State water quality certification. States are authorized to issue, condition, deny, or waive certification of certain Federal permits or licenses that may affect the physical, chemical, or biological integrity of our waters. In a few exception/cases, EPA is responsible for the certification. Currently, EPA has this responsibility for the State of South Dakota, some Indian tribes and for one specific hydropower project in Maine where State legislation precludes Maine from applying its water quality standards to the project. Section 401(a) also gives EPA specific responsibilities to notify other affected States and make independent recommendations to the Federal permitting or licensing agency in cases where a discharge may affect the waters of any State other than the State in which the discharge originates. In *Arkansas v. Oklahoma* (1992), the U.S. Supreme Court held that the Clean Water Act allows EPA to require that point sources in upstream States not violate water quality standards in downstream States. The court declined however, to address the question of whether the CWA mandated EPA to apply standards of downstream States; it merely stated EPA had the authority to do so under the CWA.

Section 401 certifications are based on State water quality standards. If a permit or license does not ensure compliance with State water quality standards, certification can be denied or be conditioned. EPA regulations,

implementing Section 303(c) of the CWA, require States to adopt standards with three basic components. First, the States are to designate the uses it wishes to protect for each of its waters. (For example, drinking water supply, support of fish and wildlife, recreation, irrigation, etc.) Second, the State is to adopt criteria to protect those uses. Criteria may be numeric or narrative and may relate to chemical, biological or physical characteristics of the water. Finally, the State must adopt an antidegradation policy to protect its high quality waters. EPA regulations direct that wherever the goal is attainable, States must strive to achieve fishable swimmable water quality (i.e., they must designate beneficial uses that meet the CWA goal of protecting the propagation of fish, shellfish, and wildlife, and providing for recreation in and on the water).

Most States currently have established narrative descriptions of the conditions to be achieved and chemical-specific numeric criteria for the water column. EPA has recently begun to emphasize that, as information permits, States should also include more specific criteria for habitat protection, criteria to help prevent contamination of sediments, and criteria for the protection of wildlife. For example, States would be encouraged to address physical impairment resulting from sedimentation that covers ripple pools, thereby eliminating spawning habitat for cold water fisheries. Temperature standards are sometimes needed because industrial discharges with elevated temperature may decrease natural dissolved oxygen levels resulting in fish kills. Water quality standards are usually designed to protect biological resources. Hydro-modification may result in standards violations, if for

example, a flowing stream turns into a reservoir changing the biological community that previously existed, thereby in manner inconsistent with the designated use, it is important for States to set their own goals as they establish standards for ecological protection.

The CWA requires States to review and revise, if necessary, their water quality standards at least once every three years. EPA publishes annual guidance for current and upcoming triennial reviews of State water quality standards. For FY 91-93, the reviews are focusing on: (1) adopting criteria to protect aquatic life and human health from toxic pollutants; (2) adopting narrative biological criteria and salt water criteria; (3) to identify adopting implementation procedures for antidegradation [sic] policies; and (4) adopting narrative standards that apply to wetlands. In the FY 94-96 triennium, the reviews will focus on adopting numeric biological criteria, sediment criteria, and special consideration of wet weather standards. It is anticipated that both narrative and numeric criteria will continue to be used, as appropriate, in State water quality standards.

As I already noted, the CWA and EPA regulations require that States adopt antidegradation policies that not only protect existing uses and existing water quality, but also protect high quality and ecologically unique waters, some of which may be outstanding national resource waters, and wetlands. Such State antidegradation policies are an integral part of water quality standards and are therefore an integral part of State § 401 certifications. These antidegradation policies could give States the ability to prevent, for example, the changing of a trout stream

into a reservoir that would support different uses, such as habitat for carp and catfish.

EPA assists and guides the States in implementing the certification provisions of CWA Section 401. EPA provides grant support to improve State 401 programs; guidance on the use of the Section 401 certification process to protect all types of waters including wetlands; and technical comments on the potential environmental impacts of individual projects.

EPA, as the principal agency responsible for administering the CWA, has taken steps to support States as they consider the full range of water quality impacts when evaluating Federal permits under Section 401 and licenses, including hydropower licenses. The types of potential adverse impacts associated with hydropower projects include loss or degradation of aquatic habitat; impacts on wildlife, fisheries, and endangered species that are dependent upon the aquatic environment; accumulation of contaminated sediments; nonpoint source impacts; water chemistry problems such as low levels of dissolved oxygen; significant changes in temperature; and significant changes in water flow volumes and timing.

The Federal Energy Regulatory Commission (FERC) has questioned the extent of a state's Section 401 authority. Courts have been divided on this issue. In a July 25, 1990 letter to EPA, FERC indicated that conditions on Section 401 certificates that would protect existing uses such as fisheries were unrelated to water quality.

States have indicated that their ability to maintain water quality and to protect drinking water, fisheries,

aquatic habitats and other beneficial uses will be severely undercut if their authority to certify FERC licenses under Section 401 is limited. In separate letters to EPA, the States of Maine and Vermont raised concerns about FERC's challenge to State authority under Section 401 to consider the full range of water quality impacts, other than water column chemistry. In a September 25, 1990, letter to EPA, the State of West Virginia raised a related concern that FERC has been reluctant to accept water quality recommendations for license conditions and in some cases issued project licenses inconsistent with the State's recommendations. Another issue of concern to the States is the sometimes sporadic enforcement of Section 401 conditions on FERC licenses. For example, FERC may choose to make Section 401-imposed flow numbers a part of the license and enforce the numbers, but choose not to enforce the installation of downstream fish screens. However, Section 401(d) is explicit that State conditions shall become a part of the Federal permit or license. As such, FERC should be prepared to enforce all conditions of its licenses.

In response to these State concerns, EPA wrote FERC on January 18, 1991 and stated that the CWA mandate to restore and protect the "chemical, physical, and biological integrity of the nation's waters" involves more than just addressing the chemistry of the water column. Protecting water quality means protecting the entire aquatic system including aquatic life, wildlife, wetlands and other habitats, vegetation, and hydrologic conditions. Toxicity and bioaccumulation of pollutants, the diversity and composition of aquatic species, entrapment of pollutants in sediment, significant changes in temperature, stormwater and

other nonpoint source impacts, habitat loss and degradation, and hydrologic changes are all relevant water quality issues.

Under Section 404 of the CWA, EPA also has certain responsibilities related to licensing of hydropower projects that involve the discharge of dredged or fill material into waters of the United States. This would apply only rarely in relicensing situations, where there is already an existing dam, but new dams generally need to be permitted under Section 404. The Army Corps of Engineers (Corps) issues Section 404 permits using environmental guidelines developed by EPA in conjunction with the Corps. EPA also reviews proposed permits; prohibits discharges with unacceptable adverse environmental impacts (the Section 404(c) "veto" authority); pursuant to Congressional authority, interprets the jurisdictional scope of waters of the United States; through regulation, interprets exemptions to Section 404; and shares enforcement authority with the Corps. The Corps has issued a nationwide permit (33 CFR, Part 330) covering discharges of dredged or fill material associated with small (less than 5 Megawatts of generating capacity) hydropower projects licensed by FERC. The nationwide general permit helps to reduce time and effort associated with permitting new projects. The timing of Section 404 review varies within the FERC licensing process for individual projects. Sometimes the applicant initiates the Section 404 application at the same time as the FERC application; sometimes the Section 404 application is submitted after FERC license approval.

All of these environmental issues and others are usually evaluated by FERC in environmental impact statements and environmental assessments prepared pursuant to the National Environmental Policy Act (NEPA). EPA conducts environmental reviews of FERC's hydropower licenses pursuant to Section 102(2)(C) of NEPA and Section 309 of the Clean Air Act (CAA). These laws establish EPA's responsibility to review and comment upon the "environmental impact of any matter relating to EPA's duties and responsibilities." In this context, EPA reviews environmental documents for a wide variety of projects. We may make recommendations which may increase projects costs, and yet these recommendations are intended to preserve current and future societal benefits produced by the natural resources EPA's recommendations are designed to protect. All relevant benefits and costs are appropriate to consider in the decision-making process. Furthermore, Section 309 requires that, when the Administrator determines that any Federal agency's legislation, action or regulation falling under the purview of the EPA review responsibilities is "unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality." While Section 309 is part of the CAA it is not restricted to air quality issues; rather, it applies to all facets of EPA's mission to protect the environment. Through its environmental reviews, EPA strives to ensure that other agencies' policies, programs, and projects not

only comply with environmental laws but also with the general spirit embodied in Section 101 of NEPA.²

It is our understanding that by the year 1999, 335 FERC licenses for existing hydropower projects will expire; 167 of those projects are due for relicensing prior to 1993. The projects are located on 105 rivers in 24 States. Most of these projects are in northeastern and midwest states. All of these projects will require NEPA compliance. EPA has met with FERC several times in the past six months to discuss its implementation of NEPA and coordination between our Agencies. To facilitate more efficient and expeditious licensing, FERC needs to incorporate NEPA at an early stage in the application process for its licenses. FERC has indicated that using third party contractors would enable them to integrate NEPA into their licensing process more effectively. With proper safeguards, EPA would support FERC's use of contractors.

EPA supports efficient licensing for hydropower projects and believes that a signed agreement between EPA and FERC describing how EPA's environmental review role links with FERC's procedures could speed the licensing process. A good model might be the interagency Agreement that Department of Army, EPA and the Department of Transportation recently signed to help

² Section 101 of NEPA urges that the Federal government use all practicable means "to foster and promote general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

integrate NEPA and Section 404 reviews at an early stage in the transportation planning process. This agreement followed issuance of a document entitled "Applying the Section 404 Permit Process to Federal-Aid Highways Projects", developed cooperatively among a number of Federal agencies. Both EPA and the Corps have recently suggested to FERC that a similar document be developed for hydropower licensing.

Although FERC is reluctant to adopt certain 401 certificate conditions in its licenses, FERC does its own review beyond chemical criteria and additionally consider [sic] biological and physical impacts on the Nation's waters. In order to address EPA concerns about the potential environmental impacts of removing all hydropower proposals less than of 5 Megawatts from FERC regulation, the Administration's proposed energy legislation would require that these projects would still be subject to sections [sic] 401 certifications. We strongly believe that Section 404 requirements should govern issuance of FERC licenses.

Thank you for the opportunity to comment. I would be happy to answer any questions you may have.
